85-1211

Supreme Court, U.S.
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No. .....

In The
Supreme Court Of The United States

October Term, 1985

Kondian R. Rajaram,
Appellant

v.

A.S. Abell Publishing Company,
Appellee

Appeal From The
Court Of Appeals Of Maryland

Jurisdictional Statement

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QUESTIONS PRESENTED FOR REVIEW

1. Is the decision of the State Court, which vacated an Order confirming a binding labor arbitration award, without requiring the specifying of facts and/or circumstances, sufficient to support a motion to vacate the award, contrary to Federal policy of encouraging resolution of labor disputes through Arbitration?

2. Is Federal policy and/or Federal Substantive Law, regarding the confirmation of labor arbitration award through State Court proceedings, applicable when the underlying arbitration hearing is held after the expiration of the Collective Bargaining and diversity is lacking?

3. Whether state or Federal law is controlling, is it contrary to law and policy for a State Court to vacate a judgment confirming the labor arbitration award without identifying the basis for

such decision and then for the State appellate court to deny an immediate appeal from the order which vacated such confirmation order?

4. Should a decision of a Federal Court disposing of a claim for punitive and exemplary damages for fraudulent misrepresentation regarding payment of arbitration award have res judicata effect and /or collateral estoppel effect on a case brought in State Court seeking confirmation of the underlying arbitration award?

5. When the grounds for an order of State Court vacating a confirmation of a Labor Arbitration Award are not provided, should the Order of the State Court be vacated and the matter remanded to said court with instructions to reinstate the confirmation order or identify the basis for vacating the confirmation order?

6. If the decision to vacate the Confirmation Order and then to deny

immediate Right of Appeal of that decision was based on application of Maryland Law, was such an interpretation of Maryland Law so manifestly contrary to prior and subsequent holdings of Maryland Courts and Statutes as to require a reversal of the State Court's Order denying appeal?

7. What is the limitations period for bringing an action for enforcement of an arbitration award and when does it accrue?

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NO OPINIONS BELOW

The Court of Appeals of Maryland ("Court of Appeals") rendered no opinion other than a denial of petition for writ of certiorari (Appendix 1a). The Court of Special Appeals of Maryland ("Court of Special Appeals") denied the appeal based on what it viewed as lack of finality necessary to allow the appeal (Appendix 18a). The Circuit Court for Baltimore City ("State Court") vacated the Order of Confirmation without making specific findings of fact or specifically identifying the grounds upon which it was vacating both the previously signed Order of Confirmation and the Order of Default (Appendix 11a).

The State Court rendered no written opinion and a transcript of the hearing is unobtainable, even though court reporter was present and the hearing transcribed.

Motion for reconsideration was filed with the State Court and was denied without a hearing (Appendix 14a).

JURISDICTIONAL STATETMENT

Nature of Proceeding

Kondian R. Rajaram appeals from the denial of a writ of certiorari by the Court of Appeals, from the Order of the Court of Special Appeals, from the denial of his Motion for Reconsideration by the State Court, and from the Order of the State Court which vacated an enrolled Confirmation Order that had confirmed an arbitration award.

Decisions of the State Court are contrary to Maryland Statutes and case law. Decisions of the Court of Special Appeals, that the Order of the State Court lacked finality and therefore could not be appealed at that time, are contrary to Maryland Statutes (Annotated Code Of Maryland Courts

and Judicial Proceedings §12-303(3)(vi)) as well as prior decisions of the Court of Appeals (Ventresca v. Weaver Brothers) (Appendix 26a) and subsequently rendered opinions of the Court of Special Appeals (Arundel Federal Savings & Loan Association v. Chester C. Lawrence, III, Et Ux) (Appendix 94a).

It is uncertain whether the decisions of the Maryland courts were based on Maryland Law or a belief by the Maryland courts that Federal Substantive Law was controlling because the underlying matter was an action seeking confirmation by an intended beneficiary of a final and binding arbitration award.

Jurisdiction

The Court of Appeals effectively entered final judgment on October 21, 1985, (Appendix 1a or 20a), when it denied the petition for a writ of certiorari. That

court based its decision on its view that the matter was not of significant importance to warrant the consideration of that court. Appellant filed Notice of Appeal (Appendix 21a) to this instant Court with Court of Appeals on January 11, 1986, a copy thereof being filed with the Court of Special Appeals and another copy with the State Court. This appeal's jurisdictional statement is being filed within ninety (90) days from the date of entry of order by the Court of Appeals denying writ of certiorari. The jurisdiction of the instant Court is invoked pursuant to:

U.S. Constitution, Amendments 5, 10 & 14;

United States Code, Title 28, §1257(2) and/or alternately (3);

United States Code, Title 28, §§1652, 2101(c), 2106, 2202;

United States Code, Title 39, §§3003 & 3004;

United States Code, Title 18, §1341;

Annotated Code of Maryland, Courts and Judicial Proceedings, Article §3-222, 3-223, 3-224, 3-227, 3-228, 12-303(3)(vi);

Maryland Rule E1;

Maryland Rule E2;

Maryland Rule 2-535;

Maryland Rule 2-543(c).

Constitutional Provitions Involved

U.S. Constitution, Amendment 5:

> "No person shall...nor be deprived of life, liberty, or property, without due process of law;..."

Amendment 10:

> "The powers...are reserved to the States respectively, or to the people."

Amendment 14:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

BACKGROUND AND SIGNIFICANT DATES

December 2, 1976: Appellant Kondian R. Rajaram ("Rajaram") and others were working

at the A.S. Abell Publishing Company ("Company") in the position of substitutes in accordance with the established "Law of the Shop" and Collective Bargaining Agreement. A letter was written by a Company executive, John Banach, which caused Rajaram and others similarly situated to be removed from their positions. Rajaram's unions objected to such removal and filed a grievance. The dispute was not resolved and the parties agreed to arbitrate the matter.

December 31, 1976: Collective bargaining agreement between Company and Rajaram's unions expired.

March 24, 1977: Arbitration proceedings began and parties agreed to be bound by arbitrator's determination.

September 7, 1977: Arbitrator, Myron L. Joseph, decided in favor of the substitute employees. The result of the award of the

arbitration proceeding was that Rajaram and other substitutes were to be placed back in the positions from which they were removed, to be paid back pay and that substitute employees should continue to be hired as per prior practice. The decision was unpublished. (Appendix 49a).

July, 1978: Rajaram is informed, by union representatives and the Company, that his position is being terminated and that he is entitled to receive the sum of Fifteen Hundred Dollars ($1,500.00). He is further informed that, if he does not accept the $1,500.00 payment within a thirty (30) day period, he will receive nothing.

August, 1978: Rajaram went to the EEOC with claim against his Unions for violation of his civil rights including interference with his right to seek redress in the courts under threat of expulsion.

August 1978: Rajaram received 2 checks from the Company, one of which apparently represented payment in satisfaction of the Arbitration Award up to and including December 31, 1976.

January 4, 1980: Having received Right to Sue letter from EEOC, Rajaram files action in U.S. District Court for Maryland (Case #B-80-0012) alleging civil rights violations, violations of LMRDA and other claims. None of the claims in this action were related to the Arbitration Award which is the underlying basis for this appeal.

January 1983: Rajaram files Second Amended Complaint, through counsel, naming the Company as defending party because the violations alleged in B-80-0012 occurred on its premises and because it had acquiesed and approved the alleged wrongful acts alleged against the Union. The subject

Arbitration Award was not a part of that complaint, or the preceding complaint.

October 1983: Company is dismissed prior to discovery by interlocutory order on basis of statute of limitations as applicable to the claims of B-80-0012.

November 16, 1983: Discovery of documents from the union files is begun under Court Order in Case B-80-0012. Rajaram has now been given access to voluminous Union Records, (approximately $200.00 in commercial photocopy cost). As the inspection of documents progressed, documents were found which showed a dispute between the Unions and Company regarding compliance with the Arbitration Award and that the dispute had been taken to N.L.R.B. A letter dated August 22, 1978 was found which stated:

"MORNING EVENING SUNDAY
THE SUN

THE A.S.ABELL COMPANY, PUBLISHER
BALTIMORE, MD. 21203

August 22, 1978

Mr. Kondian R. Rajaram
P. O. Box 13463
Baltimore, Maryland 21203

Dear Mr. Rajaram:

In accordance with arbitrator Myron L. Joseph's Award and Opinion dated September 7, 1977 regarding coverage of dormant situations in the Composing Room after 30 days, please be advised of the following.

The Sunpapers and Baltimore Typographical Union #12 have reviewed all of the records for the period from December 5, 1976 through December 31, 1976 and have ascertained that you are entitled to back pay including vacation credits earned in the amount of $246.07 in full compliance with the arbitrator's award.

The appropriate pension credit for the shifts paid will be forwarded to the I.T.U. Negotiated Pension Plan Fund.

In accordance with the wage scales as provided for in the new agreement signed on July 6, 1978, you will also find enclosed a check covering the retroactive pay for those shifts which you worked.

Sincerely,

/Signature/
Paul C. Bowen
Manager, Labor Relations
/h
cc: Baltimore Typographical Union #12"

April, 1984: Rajaram obtained from the N.L.R.B. a copy of the 2-volume arbitration transcript which showed that modified issues submitted to the Arbitrator went beyond the scope of original grievance and beyond the expiration date of the contract.

May 14, 1984: Rajaram files two (2) new separate and distinct actions in the State Court on behalf of himself and all other substitutes who were beneficiaries of the Arbitration Award as discovered through the Arbitration transcript. (Class action has never been certified.) Case #1, the matter which gave rise to this Appeal (Appendix 93a), was solely to confirm the Arbitration Award. Case #2 was filed against the Company, Company officers, Unions and Union

Officers for damages resulting from non-compliance, fraud and fraudulent concealment and failure to represent. The two State cases asserted claims regarding the Arbitration Award. They were not part of Case B-80-0012, which was pending in Federal Court.

May 17, 1984: Company is properly served with two separate lawsuits through its resident agent at its principal place of business located at 501 North Calvert Street, Baltimore, Maryland 21202.

June 15, 1984: Case # 2 was removed upon motion of the Company and the Unions to the U.S. District Court and became known as Case B-84-2465. No request for removal was made for the Case #1.

July 9, 1984: Rajaram files motion to have B-84-2465 remanded back to State Court.

July 26, 1984: Rajaram requested Order of State Court confirming the Arbitration

Award in accordance with Maryland Arbitration Statutes. Request for order of default filed based on Company's failure to respond to Case #1-"NARR".

August 2, 1984: Company files opposition to Rajaram's remand motion.

August 2, 1984: State Court Judge signed Order confirming the Arbitration Award (Appendix 2a), which was subsequently enrolled and entered as a judgment by the Clerk, in accordance with Maryland Statute. (See Courts and Judicial Proceedings, Article 3-228.)

August 3, 1984: Docket indicates that judgment was entered by Clerk.

August 14, 1984: Rajaram replies to Company's opposition to his July 9, 1984 motion to have B-84-2465 remanded back to State Court.

September 14, 1984: State Court has signed Order of Default (Appendix 4a) and Order

appointing an auditor (Appendix 6a) to assist in determining amounts due to beneficiaries of the Arbitration Award. Clerk of the Circuit Court mails NOTICE OF ORDER OF DEFAULT to 501 North Calvert Street, Baltimore, Maryland 21202, defaulting Company's known address. (The same address where service was made.)

October 4, 1984: Auditor sends notice of Auditor's hearing to Company and to James P. Garland, Esq., the attorney who was representing the Company at the Arbitration proceeding.

October 5, 1984: Mr. Garland received the auditor's letter.

October 9, 1984: Gil Abrahamson, Esq., an associate of Mr. Garland, telephoned the Company's resident attorney and Director of Labor Relations, Howard Kurman, Esq., and Mr. Abramson read the letter he had received from the Auditor, which informed

him of the impending Auditor's hearing then scheduled for October 17, 1984. Mr. Abramson also immediately sent a copy of Auditor's letter to Mr. Kurman.

October 12, 1984: Howard K. Kurman writes letter to Jeffrey Ayres, Esq., asking Mr. Ayres for advice on the matter.

October 12, 1984: Rajaram files paper No. 146 in U.S. District Court requesting court to reinstate Company in Case B-80-0012.

October 16, 1984: 5 months after Company was served with both Case #1 and Case #2, 2½ months after judgment confirming the Arbitration Award was entered and more than 30 days after Notice of Default was sent, Jeffrey Ayres, Esq., entered his appearance by filing a barrage of pleadings consisting of: motions to vacate Order of August 2, 1984 and Order of Default entered September 11, 1984, grounds and authorities in support, request for hearing, motion to

stay auditor proceeding, statement of grounds and authorities in support and proposed order with attachments totaling approximately 49 pages.

State Court issued Stay Order. (Appendix 9a).

November 19, 1984: Company opposes motion to strike with approximately 49 additional pagaes of materials.

January 11, 1985: Rajaram files 22 pagaes of request for admission of facts.

February 11, 1985: Company's 3-page objections to Request for Admissions of Facts filed.

March 11, 1985: Company files Supplemental material in support of Defendant's Motion to Vacate Default proceedings. A copy of oral opinion of Judge Black from Case B-80-0012 showing Company's dismissal from "Employment Discrimination Case".

March 12, 1985: State Court Judge signed Order vacating the Confirmation Order (Appendix 11a).

March 26, 1985: Company files motion to dismiss Rajaram's action, which obtained Confirmation of the Arbitration Award.

April 2, 1985: Rajaram and his Counsel discover fact that Howard Kurman is an attorney licensed to practice in the State of Maryland.

April 3, 1985: Motion for Reconsideration of State Court Order, which vacated Confirmation Order of August 2, 1984.

April 10, 1985: State Court Judge denied motion for reconsideration (Appendix 14a). Notice of Appeal to the Court of Special Appeals of Maryland is filed.

May 23, 1985: Court of Special Appeals' Order to prepare March 11, 1985 hearing. (Appendix 16a).

June 13, 1985: Motion to Dismiss Appeal.

June 20, 1985: Response to Company's motion to dismiss appeal.

June 26, 1985: Court of Special Appeals dismissed Appeal (Appendix 18a).

July 26, 1985: Mandate of Court of Special Appeals.

August 12-13, 1985: Rajaram filed Petition for Writ of Certiorari to Court of Appeals of Maryland.

October 21, 1985: Court of Appeals issued Order denying Rajaram's Petition for Writ of Certiorari (Appendix 1a or 20a).

STATEMENT OF THE CASE

Issues And Defenses Raised By The Company At State Court level

1) State Court does not have jurisdiction.

2) Accord and satisfaction.

3) Howard Kurman made a mistake and put the served action in his desk drawer, and that there was irregularity.

4) Res judicata bars Rajaram's claim.

5) Rajaram was not a proper party.

6) Limitations.

DEFENSES RAISED BY THE COMPANY AT THE STATE COURT DID NOT JUSTIFY VACATING THE JUDGMENT

A multitude of unsubstantiated allegations were interposed more than 30 days after Order of Default and 2½ months after judgment on Confirmation Order (Appendices 4a and 2a) were entered by Clerk. Those tactics on the part of the Company have caused substantial delay, amplified litigation and caused hardship and possbly irreparable injury to Rajaram and others.

1) Whether Federal or State law is applied, it is clear under Maryland Rules that State Court had authority to confirm the Award (Maryland Rule E2).

> **"Rule E2. Court Proceedings on Awards in Arbitrations Not Subject to Maryland Uniform Arbitration Act.**

> After a final award has been made in writing in an arbitration to which the Maryland Uniform Arbitration Act is inapplicable, court proceedings may be had to confirm, vacate, modify, correct, or enter judgment on the award. In any such case, the provisions of the Maryland Uniform Arbitration Act concerning such proceedings shall be applicable."

A final award was made in writing. The Company has admitted that prior to 1984 it never moved a court to vacate modify, correct or otherwise affect the 1977 Arbitration Award. The conclusion is clear from the plain wording of Maryland Rule E2 that the Maryland Uniform Arbitration Act applies.

Under Maryland Rule E1:

> "The procedure in arbitration to which the Maryland Uniform Arbitration Act (Code, Courts Article, Title 3, Subtitle 2) is applicable shall be in accordance with said act." (emphasis added)

Maryland Courts and Judicial Proceedings Article which is to be applied pursuant to Rule E1 specifies:

§ 3-227. Confirmation of award by court.
(a) Petition. -- A party may petition the court to confirm the award.
(b) Action by court. -- The court shall confirm the award, unless the other party has filed an application to vacate, modify, or correct the award within the time provided in §§ 3-222 and 3-223.

§ 3-228. Judgment, costs and disbursements.
(a) Entering of judgment; enforcement of judgment. -- (1) If an order confirming, modifying, or correcting an award is granted, a judgment shall be entered in conformity with the order.
(2) The judgment may be enforced as any other judgment.

If Federal case law is considered, it is also clear that the State Court would have jurisdiction to enforce even if the U.S. Arbitration Act 9 U.S.C. §§1-14 were controlling, which is not the situation. The Federal Court in fact would lack jurisdiction over the confirmation action because the Company and Rajaram are both Maryland residents and the subject matter

of the Arbitration did not involve interstate commerce.

2) The Company's defense of accord and satisfaction lacked merit and was irrelevant to whether the Award was confirmed. Bald assertions of satisfaction can not justify having the Confirmation Order vacated. Assuming, arguendo, that the Company satisfied its obligations, then confirmation of the award would have no adverse effects on the Company. If the Company had satisfied its obligations, such a showing could have been properly made at the scheduled auditor's hearing. Maryland Rule 2-543 details the powers of auditor and clearly gives him authority to consider the Company's alleged payment of the Award.

If the Company disagreed with the auditor's findings, such a dispute could be brought before a court by filing timely

exceptions to such a report and recommendation of the auditor.

Reinstating the Confirmation Order of August 2, 1984 (Appendix 2a) will not cause any hardship to the Company, except for eliminating the res judicata, collateral estoppel, issue preclusion, claim preclusion, etc.: defenses which it is now asserting in the State Court as a result of later decisions rendered in Case B-80-0012.

3) In response to the third argument which the Company presented as justificaation for vacating the Confirmation Order, i.e., Howard Kurman made a mistake: such a convenient mistake does not under Maryland Rules of Procedure constitute "mistake" justifying the action taken by the State Court. Maryland Rule 2-535 and a legion of court decisions have limited the revisory

power of the court after 30 days. It was incumbent upon the Company to satisfactorily prove that it was acting in good faith, had a meritorious defense and also to produce such facts and circumstances as would establish "fraud, mistake or irregularity." (See Eliason v. Commissioner Of Personnel, 230 Md. 56, 185 A.2d 390 (1960) and Shaw v. Adams, 263 Md. 294, 283 A.2d 390 (1971).) The Company simply failed to make such a showing of facts. The State Court Judge did not have discretion to vacate the judgment absent the pleading of sufficient facts to show fraud, mistake or irregularity.

The State Court verbalized that it had no problem finding irregularity but did not hold an evidentiary hearing or identify the irregularity. No finding of fraud or mistake was indicated. The instant Court's attention is directed to Ventresca Et Ux

v. Weaver Brothers, Inc., 292 A.2d 656, 266 Md. 398 (Appendix page 26a).

The August 2, 1984 Confirmation Order was the first final judgment rendered in any of the pending cases which involved these parties. (Appendix 2a).

The March 12, 1985 Order of Judge Kaplan (Appendix 11a), by vacating the Confirmation Order, effectively vacated the judgment.

4) Company's claims of Res judicata as a bar were based originally on an order of November 6, 1983 in a separate Case B-80-0012 which by interlocutory order dismissed the Company from an action brought by Rajaram in 1980 against his unions and (later) against the Company for various violations of his rights under LMRDA, and claims of discrimination under 42 U.S.C. §§1981, 1983, & 1985 and 42 U.S.C. 2000

et.seq. as well as a State Contract claim based on oral promises of lifetime job security made by Union representatives to Rajaram. The interlocutory dismissal of the Company in November 1983 from the action involving those claims was not dispositive. Case B-80-0012 did not include the failure to pay in accordance with the Arbitration Award. The original complaint as well as the subsequent amended complaints filed in B-80-0012, are void of the words "Arbitration" and/or "Arbitration Award". The complaints in B-80-0012 did not seek enforcement or confirmation of the Arbitration Award. If Rajaram had knowledge of his rights pursuant to the Arbitration Award, he would certainly have so stated in his original complaint. The original complaint which was filed by him Pro Se was in excess of 30 pages, but never once referred to arbitration proceedings.

Yet at page 8 of the Company's Statement of Grounds and Authorities in Support of Defendant's Motion to Dismiss or Alternatively for Summary Judgment, which was filed with State Court, the Company states "Plaintiff Rajaram's NARR in this case raises exactly the same claims as those asserted in Civil Action B-80-0012." That assertion is clearly wrong.

The Company's arguments to the State Court that the matter had already been resolved in Federal Court were incorrect. The Company was dismissed from Case B-80-0012 prior to Rajaram gaining access to the Arbitration decision and transcript.

In January 1984 the Unions in papers filed with the U.S.District Court in Case B-80-0012 were still misrepresenting to Rajaram the content of the Arbitration.

During discovery in Case B-80-0012 and after November 1983, information was uncovered, which led to the locating of the transcript of the Arbitration proceeding, along with a complete copy of the decision and award.

Those documents revealed the true facts of the Arbitration proceeding. After obtaining those documents and analyzing them, two new actions were filed, one seeking confirmation of the Award (Case L20441), which is the action that gave rise to this appeal and a second action seeking damages from the unions and the Company for their misrepresentations regarding the Award. The second action L20442 which later became identified as B-84-2465, after removal from State Court to U.S. District Court, is alleged by the Company to be "identical" to Case L20441 ("NARR"). The Company however never requested that Case

B-84-2465 (removed case) be joined with B-80-0012 even though it alleged they are identical. Instead it opposed B-80-0012 and B-84-2465 separately. The Company has continually made assertions in State Court that Case B-80-0012 is identical to the confirmation action (NARR) and in other motions alleged that B-84-2465 is identical to the confirmation action (NARR).

Rajaram filed a motion to have the Company reinstated in Case B-80-0012 based on the newly discovered evidence about the Arbitration Award and the discovery of the underlying basis for the Arbitration Award and its apparent conflict with the August 22, 1978 letter. Rajaram had discovered that the Union agreed to allow the entire issue of substitutes to be arbitrated. These facts could only be discovered from a reading of the transcript of the Arbitration proceedings, the whereabouts

of which was previously unknown to Rajaram. A review of the issues which were presented to the Arbitrator and the recognition that his decision was within those parameters reveals that payment for periods of time after December 31, 1976 was due to Rajaram and all 23 other substitutes.

Rajaram's motion to reinstate the Company was denied because he was unable to articulate sufficient facts to show fraud and "fraud" and "concealment" and because the court found no duty on the part of the Company to inform him.

When the U.S. District Court judge denied the motion to have the Company reinstated, and granted the Company's requested certification under Rule 54(b), such certification was tantamount to a final dismissal for the Company in Case B-80-0012. Such dismissal was <u>after</u> the Confirmation Order of August 2, 1984. The

State Court's vacating the confirmation order, and then denying appeal, has provided the defense of collateral estoppel to the Company when future proceedings at the State Court level resume.

The fact remains that Case B-80-0012 was not filed to seek damages for failure to pay on Arbitration Award. At a later date upon gaining certain knowledge Rajaram did attempt to have evidence of the Arbitration Award made part of B-80-0012 for possible consideration so that piecemeal litigation and piecemeal appeals could be avoided.

An appeal (Case No. 85-1268) to the U.S. Court of Appeals for the Fourth Circuit from the District Court's ruling in Case B-80-0012 was taken. The U.S. Court of Appeals upheld the final dismissal of the Company by Judge Black based on Rajaram's failure to plead sufficient facts to

establish fraud. That decision further prejudices Rajaram's confirmataion action in view of the Res Judicata claims the Company has been asserting to the State Courts. It adds to the arsenal which the Company will have to further obfuscate the issues and equities of case L20441, which sought confirmation of the final Arbitration Award.

The Company's concealment becomes clear when this matter is reviewed from an overall perspective: a perspective such as that of the instant Court. The Company's acts of concealment and misrepresentations are ongoing and have extended to inaccurately and deceptively informing the State Court of the content and status of proceedings in Federal Court. Through numerous and voluminous attachments, which it furnished and interpreted for the judge at the State Court, submitting copies of

Federal Court opinions to that State Court, which were alleged to represent the status of Federal substantive law, but do not.

The Company's frequent use of the words exact and identical when describing the cases pending in Federal Court and State Court are so far from being precise, that they can not be viewed as anything other than misleading.

(5) & (6) Regarding the Company's other "meritorious defense" of limitations, which has been repeatedly asserted to the State Court as well as the Federal Court, limitations must be considered in conjuction with the question of whether or not Rajaram was a proper party to bring the confirmation action. The limitations defense is alleged to be suported by DelCostello v. Teamsters, 462 U.S. 151 (1983) which the Company claims bars actions

not commenced within 6 months. To amplify for the State Court that DelCostello, supra, should be applied retroactively to such proceedings, the Company attached to one of its motions filed in State Court a copy of Taylor v. Ford Motor Co., 119 LRRM 2413, which was decided by the U.S. Court of Appeals for the Third Circuit. The Taylor case is presently up for review to this instant Court (See 85-614 Taylor v. Local 980, United Automobile Workers of America). One of the questions presented in that case is: Should six-month statute of limitations set forth in the DelCostello decision, be applied retroactively? Taylor also involves an employee's action to enforce arbitration award.

Other Circuits have not ruled in accord with the Third Circuit's ruling in Taylor. The Fourth Circuit has recently rendered a contrary opinion in Zemonick v.

Consolidated Coal Co., 119 LRRM 2606, which seems to state that retroactive application in some cases "shouts of inequity."

For Rajaram, just as in Zemonick, supra, retroactive application "shouts of inequities," and would result in grave injustice.

In August 1978 the Company made a partial payment on the Award possibly the amount due to Rajaram up to December 31, 1976. The agreed expanded issues of the Arbitration, however, were not known or visible to Rajaram.

After August 1978 the Union would have had, under existing law at that time, at the very minimum 3 years to bring an action against the Company. Under Maryland Law if the Arbitration Award is viewed as a specialty, the Union would have 12 years.

The Company's defense that Rajaram had no standing to bring the action is not in accordance with Federal Substantive law.

Rajaram would have no right to bring the action prior to limitations period for the union to bring an action or until the Union made it clear that it was not intending to enforce, which the Union did not do until early in 1984. (See U.S. Postal Service v. American Postal Workers Union, 564 F.Supp 545 (1983).)

Rajaram clearly had the right to bring an action after the Union's time expired or it made known that it was not going to proceed. Rajaram then became a proper party to bring the action, Lee v. Olin Mathieson Chemical Corporation, 271 F.Supp 635 (1967).

After obtaining the decision, Award and transcript, Rajaram wrote to his unions requesting enforcement. No response was

received. Rajaram then properly filed himself. The Company "informed" the State Court that Rajaram was not a proper party to bring the action and that only his Union had standing to bring the action. Federal law does not appear to be as clear as the Company has alleged, F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Local No. 781, 629 F.2d 1204 (1980).

Rajaram, after his union disregarded his request that it enforce his rights under the Arbitration Award, had an additional claim against his Union for failure to represent, which was not originally raised in B-80-0012 but was brought in B-84-2465, the action which Company removed from the State Court.

6) Although the Company has repeatedly asserted limitations, it has not cited a single Maryland case which limits the time

for bringing an enforcement action to the time frame it suggests.

After the Order of Confirmation was issued by the State Court and was entered by the Clerk, pursuant to Statutory directive, the Award had the effect of a judgment. That judgment preceded the Company's dismissal from Case B-80-0012.

By analogy under Maryland law, an action to recover under Fair Labor Standards Act is one to enforce a statutory obligation and is within the Maryland 12-year limitation period, notwithstanding that the form of action under Maryland Law is in assumpsit. (Swick v. Glen L. Martin Co., 160 F.2d 483 [4th Cir. 1947]).

From long established and still cited Maryland case law we also find that an award of the Industrial Accident Commission is not a judgment, but a specialty and is not barred by limitation

if suit thereon is instituted within 12 years from its date. (Mattare v. Cunningham, 148 Md. 309, 129 A. 654 [1925]).

WHY THIS APPEAL SHOULD BE GRANTED

Since no Maryland appellate court has given consideration to the issues presented by this case, this instant Court should review this case to prevent injustice to an entire class. Without the assistance of the instant Court, Rajaram and all others similarly situated will suffer irreparable harm. A collateral judgment of the U.S. District Court and affirmance by the Court of Appeals for the Fourth Circuit will effectively give the Company strong collateral estoppel arguments and defenses, which it would not have had if the Confirmation Order of August 2, 1984 had not been vacated by the State Court.

Recognizing the potential for irreparable harm to the class, Rajaram sought appellate relief from the Court of Special Appeals of Maryland and further sought review by the highest court in the State, the Court of Appeals of Maryland.

The Court of Special Appeals dismissed the appeal without the record and transcript even being prepared. Subsequent to the dismissal of the appeal (because of a lack of finality?), that same court issued an opinion clearly recognizing an immediate right of appeal from an interlocutory order, (opinion attached as Appendix 94a).

An immediate right of appeal is also provided for under Maryland Statutes. Courts and Judicial Proceedings:

> **Article §12-303 -- Appeals from certain interlocutory orders.**
> "A party may appeal from any of the following interlocutory orders entered by a circuit court in a civil case:

> (3) An order:
> (vi) Determining a question of right between the parties and directing an account to be stated on the principle of such determination."

Further amplification of the right of appeal as established by Maryland case law is found in Ventresca, supra (Appendix 12 on page 26a).

The attempts by Rajaram to obtain relief from the highest court of Maryland were also unavailing and the Court of Appeals did not feel the matter to be of sufficient importance and denied Rajaram's petition for a writ of certiorari (Appendix 1a or 20a).

A consideration of what rights of appeal Rajaram should have under Federal case law is found in the discussion of appealability in Rush Pettway, et al v. American Cast Iron Pipe Company, 681 F.2d 1259 (1982); at 1263, also bears substantial resemblance to the facts of the instant

case. If the balancing test of Gillespie v. United States Steel Corp., 379 U.S. 148, 85 S.Ct. 308 (1964), is implemented in this case to determine whether Federal Policy would allow appeal, the scales weigh heavily in favor of allowing the appeal.

If the instant Court does not consider this case, there will be no remedy available against the Company for its dishonoring of its obligations to these 24 substitutes.

Presently pending in the State Court are motions of the Company seeking to dismiss or alternately for summary judgment.

The Company may have been correct about one thing, i.e., that Rajaram may not be able to adequately represent the interest of the other substitutes. The resources of the Company, when they are combined with the legal talent of the Company's law firm,

may very well be too much for Rajaram to overcome, regardless of the merits of his case.

Rajaram in his appeal to the Fourth Circuit proceeded pro se in forma pauperis. Althoug he is not a pauper in the true sense of the word, he has very limited resources. His financial resources have been substantially strained during the course of this litigation.

The procedural maniplulations which have occurred in these cases are far beyond anything that I (counsel for Rajaram) have ever been in contact with during eleven years as a general practitioner. I would request that the instant Court agree with the Company's assertions that Rajaram may not be able to adequately represent the class; that the instant Court assist in finding more able counsel to assist. The request for assistance by counsel for

Rajaram is made with reluctance but in the interest of securing justice.

Present counsel does not wish to withdraw from the case, but feels proceeding alone against the forces which the Company has at its disposal could be disastrous for the already injured and displaced workers.

If this Court were to reverse the State Court's Order of March 12, 1985 which vacated the Confirmation Order of August 2, 1984, counsel for Rajaram would still be ill-equipped to proceed without assistance due to the Company's lack of cooperation and resistance to discovery efforts of Rajaram. Rajaram would then be faced with a set of circumstances similar to those discussed in a 1982 opinion from the Eleventh Circuit. (Pettway, supra.)

Discovery proceedings have not been fruitful. Rajaram filed 127 requests for admission of facts with subparts. One of

the most common responses provided by the Company was:

> "Defendant objects to this request because it calls for a pure legal conclusion and for a characterization of the 1977 arbitration award, which speaks for itself."

Responses such as that foreshadow that the quagmire, which existed in Pettway, supra, is yet to come in the instant case.

The discussion of appealability in Pettway at 1263 also bears substantial resemblance to the facts of the instant case.

For all of the foregoing reasons, it is requested that the instant Court review the proceedings from all courts that have previously made determinations concerning these parties, reverse the decision which vacated the Confirmation Order of August 2, 1984, and grant such other and further relief as justice requires.

If this Court feels that the instant appeal would be better considered under a petition for writ of certiorari, it is prayed that this appeal for review be considered as a petition for writ of certiorari and that additional briefing and argument be permitted.

CONCLUSION

Why The Questions Presented Are Substantial

For the reasons stated above this Court should accept the matter as a direct appeal and consider reversing the March 12, 1985 Order of the State Court.

If the Court feels that direct appeal is inappropriate, the Court should consider it as a petition for writ of certiorari in view of the fact that substantial questions have been raised which affect the entire arbitration process and allowable court proceedings incident thereto.

The occurrences in this matter, if left unchecked and in the present posture, encourage disregard of the arbitration process in the future. If a dissatisfied party can not be compelled to honor the results of an arbitration proceedings without extensive and costly litigation, the incentives for submitting disputes to arbitration will be substantially eroded.

If an immediate right of appeal does not exist from orders which vacate a confirmed arbitration award and judgment enrolled pursuant thereto, the time frame within which arbitration matters can be resolved will be significantly enlarged.

PRAYER FOR RELIEF

WHEREFORE your appellant prays that the Honorable Court:

(1) Review and reverse the decisions of the Maryland Courts;

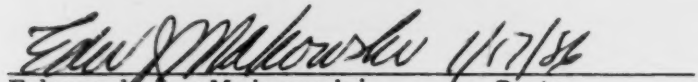
(2) Clarify the questions presented for review;

(3) Review and remand the case to the State Court with directions to reinstate the judgment of August 2, 1984;

(4) Order that all costs and fees including attorney's fees be paid by Appellee A.S. Abell Publishing Company and/or its attorneys Howard K. Kurman, Esq., and/or Jeffrey P. Ayres, Esq.;

(5) Grant such other and further relief as the Honorable Court feels just, necessary and proper.

Respectfully submitted,



Edward J. Makowski Date
1746 Eastern Avenue
Baltimore, Maryland 21231
Telephone (301) 563-0990
Attorney for Rajaram

CERTIFICATE OF SERVICE

I, Edward J. Makowski, attorney for appellant and a member of the Bar of the Supreme Court of the United States, hereby certify:

(1) that there is only one party required to be served with the aforegoing Jurisdictional Statement;

(2) that the only party required to be served is known by the following name and address, i.e.,

A.S. Abell Publishing Company
501 North Calvert Street
Baltimore, Maryland 21202;

(3):

(a) that three copies of the appellant's Jurisdictional Statement, each of those three copies being identical in every respect to any one of the 40 copies filed with the Clerk's Office on the 17 day of January, 1986, were mailed by me on this 17 day of January, 1986, by first class U.S. mail, postage prepaid with restricted delivery and return receipt requested, addressed to:

The President
A.S. Abell Publishing Company
501 North Calvert Street
Baltimore, Maryland 21202;

(b) that three identical & additional copies thereof were mailed by me on the same day in the same method mentioned above addressed to:

The President
A.S. Abell Publishing Company
501 North Calvert Street
P.O. Box 1377
Baltimore, Maryland 21278

(4) that one (courtesy) copy of the appellant's Jurisdictional Statement, identical in every respect to any one of the 40 copies filed with the Clerk' Office on 17 day of January, 1986, was mailed by

me on this 17 day of January, 1986 by first class U.S. mail, postage prepaid with restricted delivery and return receipt requested, to each of the following:

(a)

The Resident Attorney
A.S. Abell Publishing Company
501 North Calvert Street
Baltimore, Maryland 21202

(b)

The Resident Attorney
A.S. Abell Publishing Company
501 North Calvert Street
P.O. Box 1377
Baltimore, Maryland 21278

(c)

Jeffrey P. Ayres, Esq.
Venable, Baetjer & Howard
1800 Mercantile Bank &
Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201

(5) that I have filed with the Clerk's Office a filled Entry of Appearance form whose copy is not required to be served on a party.

Edward J. Makowski 1/17/86

Edward J. Makowski Date
Attorney for Appellant
1746 Eastern Avenue
Baltimore, Maryland 21231
Telephone (301) 563-0990

No. .....

In The
Supreme Court Of The United States

October Term, 1985

Kondian R. Rajaram,
Appellant

v.

A.S. Abell Publishing Company,
Appellee

Appeal From The
Court Of Appeals Of Maryland

Appendices
To
Jurisdictional Statement

Edward J. Makowski, Esq.
1746 Eastern Avenue
Baltimore, Maryland 21231
Telephone (301) 563-0990

TABLE OF APPENDICES

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In the Court of Appeals of Maryland

Petition Docket No. 387

September Term, 1985

(No. PHC 155 September Term, 1985

Court of Special Appeals)

KONDIAN R. RAJARAM

v.

A. S. ABELL PUBLISHING COMPANY

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer and response thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: October 21, 1985

IN THE CIRCUIT COURT FOR BALTIMORE CITY

Case No: 84 135042 / L20441

KONDIAN R. RAJARAM,
on behalf of himself and all others similarly situated, Plaintiffs

vs

A.S. ABELL PUBLISHING COMPANY
501 North Calvert Street
Baltimore, Maryland 21202, Defendant.

ORDER

KONDIAN R. RAJARAM, on behalf of himself and all other similarly situated, having on the 14th day of May, 1984, filed with the clerk of this court a pleading, together with copies of the decision and award of American Arbitration Association Case Number 14 30 1492, for an order of this court confirming the award of the arbitrators in the above-entitled matter, and proof having been made to the satisfaction of the court that said pleading and copies of said award were served upon the adverse party within the manner required by law; the court finds that the pleading of the petitioner for an order of this court

confirming the award of the arbitrators should be granted and judgment entered in conformity therewith.

THEREFORE, on this 2nd day of Aug., 1984, it is ORDERED:

That the award of the arbitrators in the above-entitled matter be, and the same is, hereby confirmed in all respects.

/Signature/
Robert L. Karwacki
J U D G E

TRUE COPY TEST
/Signature/
Saundra E. Banks

IN THE CIRCUIT COURT FOR BALTIMORE CITY

Case No: 84 135042 / L20441

KONDIAN R. RAJARAM, on behalf of himself and all others similarly situated,
Plaintiffs

vs

A.S. ABELL PUBLISHING COMPANY
501 North Calvert Street
Baltimore, Maryland 21202
Defendant

REQUEST FOR ORDER OF DEFAULT

The plaintiff herein requests an Order of Default against the defendant for failure to plead as provided by the Maryland Rules.

Date: 7/26/84

/Signature/
Edward J. Makowski
Attorney for Plaintiff

NON MILITARY AFFIDAVIT

1. The defendant is not in the military service of the United States;

2. The defendant is not in the military service of any nation allied with the United States;

3. The defendant has not been ordered to report for induction under the Selective Training and Service Act;

4. The defendant is not a member of the Enlisted Reserve Corps who has been ordered to report for military service.

I solemnly affirm under the penalties of perjury that the content of the aforegoing paper are true and correct to the best of my knowledge information and belief.

/Signature/
Kondian R. Rajaram AFFIANT

ORDER OF DEFAULT

It is ORDERED this 11th day of Sept, 1984 that an Order of Default is entered against the Defendant for failure to plead.

/Signature/
Joseph H. H. Kaplan
J U D G E

TRUE COPY TEST
/Signature/
Saundra E. Banks CLERK

IN THE CIRCUIT COURT FOR BALTIMORE CITY

Case No: 84 135042 / L20441

Kondian R. Rajaram, et al. Plaintiffs

v.

A.S. Abell Publishing Company Defendant

ORDER

KONDIAN R. RAJARAM, on behalf of himself and all others similarly situated, having had Judgment in their favor entered by the court on the 2nd day of August, 1984, confirming the decision and award of American Arbitration Association Case Number 14 30 1492, and upon consideration of the Motion of Plaintiffs for Appointment of Auditor; the court finds that the Motion for Appointment of Auditor should be granted and referral of this action be made in conformity therewith.

THEREFORE, on this 13th day of Sept., 1984, it is ORDERED:

That this above-entitled matter be,

and the same is, hereby referred to DONALD ALLEWALT, who will serve as auditor with full powers to act in accordance with Maryland Rule 2-543(c), for the purpose of enforcement of judgment, and is directed to ascertain the balance of wages due to date for each Plaintiff as described in the Motion for Appointment of Auditor. The mathematics of actuarial probability may be utilized in determination of such wages due. The scope of the audit shall include the determination of wages due each Plaintiff party via contract referred to in the Arbitrator's award and in contracts subsequent to said award in conformance therewith, the determination of the amount of interest payable from the date of said award to the present and report of costs, attorneys fees and other expenses incurred. The auditor shall also determine the present value of future wages payable, as the

result of the arbitration award, to date of retirement for each Plaintiff and may calculate an off-setting amount to be credited against the total due each Plaintiff party by way of mitigation. It is further

ORDERED:

That all compensation, fees and costs of auditor and proceedings regarding this matter be assessed against the defendant. It is further

ORDERED:

That the audit shall be completed and the report rendered within 60 days of this date.

/Signature/
JOSEPH H. H. KAPLAN
J U D G E

IN THE CIRCUIT COURT FOR BALTIMORE CITY

CASE NO.: 84-135042/L20441

KONDIAN R. RAJARAM, Plaintiff

v.

A.S. ABELL PUBLISHING COMPANY, Defendant

ORDER

Upon consideration of Defendant's Motion to Stay Auditor Proceedings Pending Resolution of Defendant's Motion to Vacate Order of August 2, 1984, and Order of Default Entered September 11, 1984, it is by the Court, this 16th day of October, 1984,

ORDERED, that Defendant's Motion shall be, and the same hereby is, GRANTED: and it is further

ORDERED, that hearings before the Special Auditor shall be, and hereby are, STAYED until Defendant's Motion to Vacate Order of August 2, 1984, and Order of Default Entered September 11, 1984, filed October 16, 1984, has been resolved.

/Signature/
JOSEPH H.H. KAPLAN
JUDGE

This document has been altered by eliminating the Judge's signature

IN THE CIRCUIT COURT FOR BALTIMORE CITY

CASE NO.: 84-135042/L20441

KONDIAN R. RAJARAM, Plaintiff

v.

A.S. ABELL PUBLISHING COMPANY, Defendant

ORDER

Upon consideration of Defendant's Motion to Vacate Order of August 2, 19084, and Order of Default entered September 11, 1984, Plaintiff's Motion to Strike Defendant's Motion to Vacate, Defendant's Opposition to Plaintiff's Motion to Strike, and the memoranda, affidavits, and materials submitted by the parties in support of their Motions, and having heard the oral arguments of both sides, it is by the Court, for the reasons provided at the hearing of March 11, 1985, this 12th day of March, 1985,

ORDERED, that Defendant's Motion to Vacate shall be and the same hereby is

GRANTED; and it is further

ORDERED, that Plaintiff's Motion to Strike Defendant's Motion to Vacate shall be, and the same hereby is, DENIED; and it is further

ORDERED, that Judge Karwacki's Order of August 2, 1984, and this Court's Order of Default dated September 11, 1984, shall be, and hereby are, VACATED; and it further

ORDERED, that Defendant shall file its answer or preliminary motion to Plaintiff's Narr, filed May 14, 1985, within 15 days of the entry of this Order; and it is further

ORDERED, that Defendant shall respond to Plaintiff's Request for Admission of Facts, filed on or about January 11, 1985, within 30 days of the entry of this Order; and it is further

ORDERED, that, since the Order of

August 2, 1984, has been vacated, the Order of September 13, 1984, referring this matter to an Auditor to determine amounts due in accordance with the Order of August 2, 1984, is MOOT; and it is further

ORDERED, that the parties shall notify the Court to have a prompt hearing date scheduled on whether the arbitration decision of September 7, 1977, attached as an Exhibit to Plaintiff's Narr, should be confirmed, as soon as the parties have completed discovery.

/Signature/
JOSEPH H. H. KAPLAN
Judge

JUDGE Joseph H. H. Kaplan
Sitting as Motions Judge

TITLE OF CASE:

KONDIAN RAJARAM

VS.

A. S. ABELL PUBLISHING CO.

COURT:

Circuit Court for Baltimore City

DOCKET: PAGE:

CASE NO.: 84 135 042 / L20441

DATE OF HEARING:

See MD Rule 2-311.

APPEARANCES:

Edward Makowski, Jr., Esq.
FOR PLAINTIFF

Jeffrey Ayres, Esq.
Stanley Mazaroff, Esq.
FOR DEFENDANT

FOR THIRD PARTY DEFENDANT

RULING BY THE COURT:

The Court, having reviewed and considered Plaintiff's Motion for Reconsideration, Vacation and

Reinstatements and Defendant's Opposition to Plaintiff's Motion for Reconsideration, Vacation and Reinstatements, Plaintiff's Response to Defendant's Opposition to Plaintiff's Motion for Reconsideration, Vacation and Reinstatements, finds no basis for vacating its Order of March 12, 1985.

Accordingly, it is this 10th day of April, 1985, ORDERED that Plaintiff's Motion for Reconsideration, Vacation, and Reinstatements be and it is hereby DENIED.

cc: All counsel listed above.

/S/

_____
JUDGE
Judge Joseph H. H. Kaplan

SUPREME BENCH 110-86231

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Kondian R. Rajaram

v.

A. S. Abell Publishing Company

PHC No. 155

September Term, 1985

ORDER DIRECTING THE PREPARATION OF THE TRANSCRIPT

The above entitled matter came on for a Prehearing Conference before the undersigned on the 21st day of May, 1985, and;

It appearing to the Court that as of this date the parties have: () Limited, though not settled, the issues raised by the appeal. (xx) Have been unable to settle the issues raised by the appeal.

IT IS ORDERED, that the time within which a transcript must be ordered pursuant to Maryland Rule 1026 a. 2. and the record prepared and filed with this Court pursuant

to Maryland 1025 a. shall begin to run from the date of this Order.

Dated: May 23, 1985

FOR THE COURT

/Signature/
JUDGE ROBERT L. KARWACKI

(Civil No. 84 135042/L20441)

cc: *Saundra E. Banks, Clerk
Circuit Court for Baltimore City
Edward Jack Makowski, Esq.
Jeffrey P. Ayres, Esq.

In the

COURT OF SPECIAL APPEALS

of Maryland

PHC No. 155

September Term, 1985

Kondian R. Rajaram et al

Appellants

vs.

A. S. Abell Publishing Company

Appellee

ORDER

Upon consideration of appellee's Motion to Dismiss Appeal and appellant's answer thereto, it is by the Court of Special Appeals this 26th day of June, 1985,

ORDERED, that appellee's motion be, and the same is hereby granted; and it is further

ORDERED, that this appeal shall be, and hereby is, dismissed under Maryland Rule 1035 (b) (1).

/Signature/
JUDGE GARRITY

/Signature/
JUDGE ADKINS

/Signature/
JUDGE BLOOM

In the Court of Appeals of Maryland

Petition Docket No. 387

September Term, 1985

(No. PHC 155 September Term, 1985

Court of Special Appeals)

KONDIAN R. RAJARAM

v.

A. S. ABELL PUBLISHING COMPANY

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer and response thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: October 21, 1985

IN THE
COURT OF APPEALS OF MARYLAND

Petition Docket No. 387

September Term, 1985

(COURT OF SPECIAL APPEALS OF MARYLAND)
(No. PHC 155 - September Term, 1985)

KONDIAN R. RAJARAM,
Petitioner

vs.

A.S. ABELL PUBLISHING COMPANY,
Respondent

NOTICE OF APPEAL
FROM THE ORDER OF DENIAL DATED
OCTOBER 21, 1985
TO THE
SUPREME COURT OF THE UNITED STATES

Edward J. Makowski,
1746 Eastern Avenue
Baltimore, Maryland 21231
Telephone (301) 563-0990
Attorney for Petitioner

Kondian R. Rajaram, Petitioner, hereby gives Notice of Appeal from the Court's Order, entered October 21, 1985, which denied a writ of certiorari to the Court of Special Appeals of Maryland.

This Appeal is being taken pursuant to:

U.S. Constitution, Amendments 5, 10 and 14;

28 U.S.C. §§1257 (2) and/or, alternatively, (3);

28 U.S.C. §§1652, 2101(c), 2106, and 2202;

39 U.S.C. §§3003 and 3004;

18 U.S.C. §1341;

Annotated Code of Maryland, Courts and Judicial Proceedings, Article §§3-222, 3-223, 3-224, 3-227, 3-228, and 12-303(3)(vi);

Maryland Rule E2.

This Notice of Appeal is mailed to

the Clerk of this Court on this 11th day of January, 1986, copy/copies thereof being mailed on the same day to each of the following in the method explained in the attached Proof of Service:

Clerk, Supreme Court of the United States,

Clerk, Court of Special Appeals of Maryland,

Clerk, Circuit Court for Baltimore City,

The President, A.S. Abell Publishing Company, (the only party required to be served),

Howard K. Kurman, Attorney for A.S. Abell Publishing Company,

Jeffrey P. Ayres, Esq., of Venable, Baetjer & Howard, Counsel for Respondent in Maryland courts from October 16, 1984.

Dated: Baltimore City, Maryland
January 11, 1986

/Signature/
Edward J. Makowski
1746 Eastern Avenue
Baltimore, Maryland 21231
Telephone (301) 563-0990

PROOF OF SERVICE

I, Edward J. Makowski, Attorney for

Appellant and a member of the Bar of the Supreme Court of the United States, do certify that, on this 11th day of January, 1986, I mailed copy/copies of the foregoing Notice of Appeal and this attached Proof of Service on each of the following, as indicated below, by first-class mail postage prepaid return receipt requested:

Clerk, Supreme Court of the United States
(one copy mailed),

Clerk, Court of Special Appeals of Maryland
(one copy mailed),

Clerk, Circuit Court for Baltimore City
Courthouse East
111 North Calvert Street
Baltimore, Maryland 21202
(one copy mailed)

The President
A.S. Abell Publishing Company
501 North Calvert Street
Baltimore, Maryland 21202
(three copies mailed)

The President
A.S. Abell Publishing Company
501 North Calvert Street
P.O. Box 1377
Baltimore, Maryland 21278
(three copies mailed)

Howard K. Kurman, Attorney for
A.S. Abell Publishing Company
501 North Calvert Street
Baltimore, Maryland 21202
(one copy mailed)

Howard K. Kurman, Attorney for
A.S. Abell Publishing Company
501 North Calvert Street
P.O. Box 1377
Baltimore, Maryland 21278
(one copy mailed)

Jeffrey P. Ayres, Esq.
Venable, Baetjer & Howard
1800 Mercantile Bank & Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201
(one copy mailed)

/Signature/
Edward J. Makowski

Subscribed and sworn to before me this 11th day of January, 1986.

/Signature/
WILLIAM H. EAGERS
Notary Public in and for the
County of Baltimore, State of
Maryland.
My Commission Expires on the
1st day of JULY, 1986.

Filed January 11, 1986.

(Ventresca Et Ux. v. Weaver Brothers, Inc.,

292 A.2d 656, 266 Md. 398)

VENTRESCA ET UX. v. WEAVER BROTHERS, INC.

[No. 393, September Term, 1971.]

Decided July 7, 1972.

APPEAL--Final Judgment--Order Striking Out Enrolled Judgment May Be Immediately Appealed--Maryland Rule 605 a. pp. 402-403

JUDGMENTS--Enrolled Judgment--Power Of Lower Court To Revise And Control Judgment After Expiration Of 30 Days Following Its Entry--Enrolled Judgment May Be Revised Or Set Aside Only Upon Proof Of Fraud, Mistake Or Irregularity--Moving Party Must Also Establish Good Faith And Existence Of Meritorious Defense--Maryland Rule 625 a. pp. 403-404

PROCESS--Party In Default For Failure To Appear--Defaulting Party Is Not Entitled To Service Of Subsequent Motions--Maryland Rule 306 b. Where party failed to plead to declaration served upon it, the Court held such defaulting party was not required to be served with subsequent motion for default judgment or motion for entry of final judgment, and that the failure to notify such party or his attorney of the intention to obtain a default judgment is not on "irregularity" within the meaning of Maryland Rule 625 a. pp. 404-405

MOTIONS--Service--Except Where Party Is In Default For Failure To Appear, A Copy Of A Motion Shall Be Served Upon Parties Affected By Such Motion--Maryland Rules 321 c. 306 b. pp. 405-407

JUDGMENTS--Setting Aside Enrolled Judgment--Failure To Serve Motion For Default Judgment On Other Paraties Is Not An "irregularity" For Which Enrolled Judgment May Be Set Aside--Duly Summoned Litigants Must Keep Themselves Informed Of Proceedings In Pending Case. In the instant case, plaintiff obtained default judgment against one defendant without serving copies of the motion for default judgment on motion for entry of final judgment upon co-defendants. A co-defendant, the principal of the party in default, thereupon joined the defaulting party in moving to set aside the enrolled judgment on the basis of "irregularity" and "mistake." The Court held that (1) failure to serve co-defendants with copies of aforesaid motions was not an "irregularity"; and (2) the clerk's acceptance of plaintiff's motions absent "admission or proof of service of a copy thereof upon the opposite party" was not a "mistake" within the meaning of Maryland Rule 625 a. The Court reasoned that the entry of an enrolled judgment was not the result of "irregularity" or "mistake" in the conduct of the law suit, but rather was in consequence of the co-defendant's

failure to meet requirements of "ordinary diligence" (i.e., checking the docket) imposed upon one seeking to vacate an enrolled judgment. pp. 407-408

JUDGMENTS--Setting Aside Enrolled Judgment--Clerk's Acceptance Of Motion For Default Judgment Without Admission Or Proof Of Service Upon Other Parties Is Not A "Mistake" For Which Enrolled Judgment May Be Set Aside--Maryland Rules 306 a 2, 625 a. p. 408

J. A. A.

Appeal from the Circuit Court for Prince George's County (MITCHELL, J.).

Action by Domenico Ventresca and Elsie Ventresca, his wife, against Otis Elevator Company, Parkwood, Incorporated, Weaver Brothers, Inc., and H. G. Smithy Company for alleged injuries sustained in an elevator accident. A default judgment and subsequently a final judgment was entered against Weaver Brothers, Inc., after that defendant failed to file a plea. Parkwood, Inc. and Weaver Brothers, Inc., thereafter moved to set aside or revise the

enrolled judgment. From an order setting aside the judgment by default and entry of final judgment, the plaintiffs appeal.

Order striking judgment reversed; judgment against Weaver Brothers, Inc., reinstated, and case remanded for inquisition on amount of damages; appellee to pay the costs.

The cause was argued before BARNES, McWILLIAMS, SINGLEY, SMITH and DIGGES, JJ., and IRVING A. LEVINE, Associate Judge of the Sixth Judicial Circuit, specially assigned.

Thomas E. Walker, with whom was George A. Wilkinson, Jr., on the brief, for appellants.

Thomas A. Farrington, with whom were Sasscer, Clagett, Channing & Bucher on the brief, for appellees.

LEVINE, J., delivered the opinion of the Court.

This is an appeal from an order vacating a default judgment obtained by the appellants (plaintiffs below) against the appellee, Weaver Brothers, Inc., for failure to file a responsive pleading to the declaration. Since the appellee was but one of four defendants sued by the appellants, an order was also entered pursuant to Rule 605 a, by which the court made an express determination that there was "no just reason for delay in entering a final judgment as to liability in favor of the Plaintiffs..." and directed that a final judgment as to liability be entered.

Confusion arose immediately after suit was filed because the appellants, although shown by the allegations of the declaration to have been aiming at Weaver Brothers, Inc., erroneously sued a wholly different corporation known as "Weaver Brothers, Inc. of Maryland." In what may

be described as something of a "knee-jerk" reflex, the latter filed a geaneral issue plea. The appellants quickly recognized that they had captioned their case against the wrong party and sought to rectify their error by obtaining leave of court to interlineate the correct name, the effect of which was to substitute "Weaver Brothers, Inc." for "Weaver Brothers, Inc. of Maryland."

The appellee was finally served on May 7, 1971, returnable to the first Monday of June. On July 2, 1971, ten days after "Weaver Brothers, Inc." was required to plead, the appellants obtained their default judgment subject to proof of damages, and on August 3, 1971, there was entered the final judgment pursuant to Rule 605 a. The three other defendants filed general issue pleas on May 3, 1971, May 18, 1971 and August 11, 1971, respectively,

each of them apparently being timely filed, as no defaults were sought against any of them. Neither the motion for default judgment nor the motion for entry of final judgment was served on any of the defendants.

On September 21, 1971, notwithstanding that "Weaver Brothers, Inc. of Maryland" and its attorney had previously been let out of the case after filing a general issue plea, counsel now representing the appellee filed a second general issue plea on behalf of "Weaver Brothers, Inc. of Maryland" and, jointly with one of the other defendants which they also already represented of record, Parkwood, Incorporated (Parkwood), filed a "Motion to Set Aside or Revise Judgment." The motion alleged mistake and fraud, although the latter contention was subsequently abandoned; later, the moving

parties also claimed "irregularity." Only after the appellants signaled by a "Motion Ne Recipiatur" that the "Motion to Set Aside" had been filed on behalf of a corporation which was no longer a party, much less one in default, did counsel correct the error by moving to amend the motion so as to assert it on behalf of "Weaver Brothers, Inc." together with Parkwood.

Extensive memoranda, exhibits and affidavits of counsel were filed, and the matter finally came on for hearing before Judge Mitchell who, in setting aside the judgment, ruled from the bench that the appellant should have served all parties other than the appellee with the motion for default judgment. He was evidently under the impression that the "Motion to Set Aside" was addressed to his discretion, judging from this portion of his statement:

> Well, gentlemen, I think this case comes within the area of discretionary action on the part of the Court rather than as a matter of any hard and fast legal right.
> * * *
> "Whether a strict interpretation of the letter of the Rule would place that obligation upon him [to serve the other defendants] is a matter that might be ruled upon either way I suppose, but this Court would seem to have some discretion in this matter.
>
> "Default judgments are not looked upon with favor, really, more so maybe under the rules than they used to be, but I can see no injury to anyone by permitting this case to go forward on its merits..."

Although at least one seemingly material fact was in sharp dispute as a result of the lengthy affidavits of respective counsel, the court took no testimony. This was unfortunate, as the hearing consisted principally of extended argument of counsel, in which both sides made generous reference to "facts" neither contained in the aforementioned affidavits nor otherwise disclosed by the record.

1.

In limine, the appellee urges dismissal of the appeal for the reason that the order setting aside the judgment, from which this appeal was taken, was not a final judgment and, therefore, is not appealable.

In support of its contention, it calls attention to the fact that the order, in addition to setting aside the judgment entered against it, required that the case "be placed upon the docket for trial." The appellee apparently reasons, without citing any supporting authority, that an order which specifies the next logical step, given the vacation of the judgment, can only be interlocutory in nature, especially since the appellants had established neither liability of the remaining defendants nor damages against any of them.

This argument, if we have correctly followed it, does not take into account a

basic proposition which even the appellee has consistently recognized in the court below and here, namely that the judgment had been enrolled some 18 days before the joint motion to set it aside was filed.

Thus, since the order appealed from vacated an enrolled judgment, appellee's contention is controlled by Mutual Benefit Society of Baltimore, Inc. v. Haywood, 257 Md. 538, 263 A. 2d 868 (1970), where, in holding that "an order striking out a judgment more than thirty days after entry is in the nature of a final order appealable to this Court," we cited with approval Gay Investment Co. v. Angster, 231 Md. 318, 322, 190 A. 2d 95 (1963), and Williams v. Snyder, Adm'r, 221 Md. 262, 267-68, 155 A. 2d 904 (1959). Those decisions and other authorities cited in Williams, make it clear that one obtaining an enrolled judgment acquires a substantial right which, if

divested by an order setting it aside, confers an immediate right of appeal to this Court. Having obtained an enrollment of their judgment by the expiration of 30 days following the order making the judgment final pursuant to Rule 605 a, the appellants acquired an immediate right of appeal to this Court.

2.

Rule 625 a provides in relevant part that after a judgment becomes enrolled by the expiration of 30 days following its entry, the court has "revisory power and control over such judgment, only in case of fraud, mistake or irregularity." As a result of a host of decisions too numerous to list completely here, it is now axiomatic that the power of the court to revise and control an enrolled judgment is no longer discretionary. Berwyn Fuel & Feed Co. v. Kolb, 249 Md. 475, 240 A. 2d 239 (1968);

Suburban Properties Management, Inc. v. Johnson, 236 Md. 455, 204 A. 2d 326 (1964); Tasea Inv. Corp. v. Dale, 222 Md. 474, 160 A. 2d 920 (1960), and Williams v. Snyder, Adm'r supra, are but a few of the cases which stand for that proposition. Thus, to the extent that the court below set the judgment aside in what it viewed as an exercise of discretion, it acted in error.

From numerous decisions applying Rule 625 a, there have also emerged the requirements that, in addition to proving "fraud, mistake or irregularity," one seeking to set aside an enrolled judgment must also establish that he is acting in good faith, with ordinary diligence, and that he has a meritorious defense. Temple Hill Baptist Church, Inc. v. Dodson, 259 Md. 515, 270 A. 2d 802 (1970); Grantham v. Board of County Commissioners, 251 Md. 28, 246 A. 2d 548 (1968); Eliason v.

Commissioner of Personnel, 230 Md. 56, 185 A. 2d 390 (1962); Berwyn Fuel & Feed Co. v. Kolb, and Tasea Inv. Corp. v. Dale, both supra.

The appellee contends here, as it did in the court below in seeking to set the judgment aside, that the filing of the motions by counsel for the appellants without informing the other defendants was an "irregularity," and that there was a "mistake," in that the clerk should not have received the motions since they were unaccompanied "by an admission or proof of service upon the opposite party."

Since the appellee concedes, as indeed it must under Rule 306 b, that, as the defaulting party, it was not entitled to service of the motions, its argument is necessarily reduced to the proposition that failure to serve counsel for Parkwood was an "irregularity," in that appellants'

counsel knew that the former would also be representing "Weaver Brothers, Inc." and thus, had he been served, would have filed a pleading for the appellee. It relies heavily for this contention upon Rule 321 c which provides that "[a] copy of a motion...shall be served upon the party affected by such motion..." (emphasis supplied.) It argues that Parkwood was "affected" by the default since the declaration, in the main, asserts liability against the latter by reason of negligence of its agent, "Weaver Brothers, Inc." Thus, if the judgment were allowed to stand, it would be required to defend at a trial with a default having been entered against its agent. The appellee also points to the fact that in responding to interrogatories propounded by one of the other defendants, the appellants, on June 1, 1971 (after service upon "Weaver Brothers, Inc." but

before the default was entered), served copies of their answers not only upon counsel then of record for other parties, but also upon "Weaver Brothers, Inc.," in care of its resident agent in Baltimore.

Thus, the appellee says, "irregularity" was demonstrated in that the failure to serve Parkwood's attorney with the default papers was not the result of mere oversight, but was a "back door" gambit aimed at obtaining an enrolled judgment.

In Grantham v. Board of County Commissioners for Prince George's County, supra, where Berwyn Fuel & Feed Co. v. Kolb, supra, was quoted with approval, the burden which the party seeking to strike out an enrolled judgment must meet was summarized as follows:

> "'As was pointed out in Tasea Investment Corp. v. Dale, 222 Md. 474, 160 A. 2d 920 (1960) and in Murray v. Fishman Construction Co., 241 Md. 538, 217 A. 2d 357 (1966), the trial court, besides requiring

the party, who moves to set aside an enrolled judgment, to prove that he is acting in good faith and with diligence and that he has a meritorious defense, should also require a showing of such facts and circumstances as will establish the fraud, mistake or irregularity allegedly used to obtain the judgment sought to be vacated.

"'* * * A mere error, which in legal parlance generally connotes a departure from truth or accuracy, State ex rel. Smith v. Smith, 252 P. 2d 550, 555 (Ore. 1953) and Gronseth v. Mohn, 234 N. W. 603, 604 (S. D. 1931), is certainly not an irregularity (under Rule 625), which is usually defined as the doing or not doing of that, in the conduct of a suit at law, which, conformable with the practice of the court, ought or ought not to be done. State v. Lazarus, 65 S. E. 270, 272 (S. C. 1909); State ex rel. Caplow v. Kirkwood, 117 S.W.2d 652 (Mo. 1938); Babb v. City of Wichita, 241 P. 2d 755 (Kan. 1952); Black's Law Dictionary (4th Ed.).

"'We also point out that the entry of the default judgment, pursuant to Rule 310 b, by the plaintiff without giving notice to the defendant did not constitute an 'irregularity' within the meaning of Rule 625. Pumphrey v. Grapes, 215 Md. 573, 138 A. 2d 916 (1958). Nor was the attorney for the plaintiff obliged to advise the attorney for the defendant of his

> intention to enter judgment by default. See Rule 306 b.' 249 Md. at 478-79." (Emphasis in original.) 251 Md. at 35.

The definition of "irregularity" quoted above was also applied in Mutual Benefit Society of Baltimore, Inc. v. Haywood, supra.

We have considerable doubt that the other defendants were "affected" within the meaning of Rule 321 c by the appellants' motions aimed only at the obtention of a judgment against the appellee, especially in the absence of any determination below that appellants' counsel knew that the attorneys of record for Parkwood would also represent "Weaver Brothers, Inc." We find it unnecessary, however, to reach this issue, as we are of the view that the failure to serve the other parties was not an "irregularity" within the meaning of Rule 625 a.

As we have already noted, under the provisions of Rule 306 b, "[s]ervice need not be made on a party in default for failure to appear," and the failure to notify such a party or his aattorney of the intention to obtain a default judgment is not an "irregularity." Penn Central Company v. Buffalo Spring & Equipment Co., Inc., 260 Md. 576, 273 A. 2d 97 (1971); Household Finance Corporation v. Taylor, 254 Md. 349, 254 A. 2d 687 (1969), and Himes v. Day, 254 Md. 197, 254 A. 2d 181 (1969).

The appellee's contention that, nevertheless, the appellants' failure to serve Parkwood's attorney was an "irregularity," lacks merit for the simple reason that it represents an effort by the defaulting party to relieve itself of the burden of "ordinary diligence" by shifting it to the appellants. In stressing the failure of the appellants to serve

Parkwood's attorney, the appellee has neither here nor in the court below offered any explanation for the failure of the appellee or its intended attorneys, who were already of record for Parkwood, to keep informed of the proceedings. As we have already stated, a litigant who has been duly summoned must keep himself informed in regard to what occrus in a pending case. Penn Central Company v. Buffalo Spring & Equipment Co., Inc., and Tasea Investment Corp. v. Dale, both supra.

Although four months elapsed from the date the appellee was duly summoned to the date of enrollment, no indication is given that the appellee or its attorneys ever informed themselves of the status of the case during that period. This failure on their part takes on added significance when it is noted that during the same period, counsel for the appellee filed papers on

behalf of one or more of the other defendants below on four separate occasions. In these circumstances, the failure to serve Parkwood with papers directed at obtaining a default judgment against "Weaver Brothers, Inc." did not constitute an "irregularity" within the meaning of Rule 625 a.

The appellee's reliance upon Mutual Benefit Society of Baltimore, Inc. v. Haywood, supra, is misplaced, as the facts of that case are clearly distinguishable. There, the clerk's failure to give notice of a contemplated dismissal for want of prosecution was held to be an "irregularity" under Rule 625 a, since the local rule relied upon by the clerk in entering the dismissal collided with the notice requirements of Rule 530 b. The result was a dismissal of what may have been the claim of a legitimate litigant without the notice

clearly required by Rule 530 b.

Nor, did the appellee establish that there was a " mistake," which would support the decision of the court below, in the clerk's acceptance of the appellants' motions absent the "admission or proof of service of a copy thereof upon the opposite party..." as provided in Rule 306 a 2. The short answer to the appellee's contention in this regard is that, notwithstanding the acceptance of the default papers for filing, the absence of "admission or proof of service" was as evident to the court when the orders were signed, correctly we think, as it was to the clerk who accepted them for filing. The entry of the judgment occurred not as the result of "mistake," there being none, but rather in consequence of the appellee's failure to meet the requirements of "ordinary diligence" imposed upon one seeking to vacate an

enrolled judgment. See Penn Central Company v. Buffalo Spring & Equipment Co., Inc.; Household Finance Corporation v. Taylor, and Grantham v. Board of County Commissioners for Prince George's County, all supra.

For these reasons, the enrolled judgment obtained by the appellants against the appellee should not have been set aside.

Order striking judgment reversed; judgment against Weaver Brothers, Inc. reinstated; remanded for inquisition on amount of damages; appellee to pay the costs.

In the matter of arbitration between The A.S. Abell Company and Baltimore Typographical Union No. 12

American Arbitration Association Case No. 14 30 1492

Appearances for the Company: James P. Garland, Esq. Gilbert A. Abramson, Esq. Semmes, Bowen & Semmes

Appearances for the Union: Bernard W. Rubenstein, Esq. Edelman, Levy and Rubenstein

Pittsburgh, Pennsylvania

September 7, 1977

Background: For many years the Company operated in a very tight labor market and employed all of the qualified journeymen who were available. After the Taft-Hartley Act of 1947 ruled out the parties' closed-shop arrangement, the Union continued to participate in the hiring process. The Local Union maintains a "slip" or "sub" board, on which are listed each day the names of

individuals who are available for work as extras or substitutes. The "office" (Employer) hired "extras" in order of "priority" (seniority) from the slip board to supplement the regular work force. When a regular "situation holder" (regular employee) was absent, he was required to "protect" (cover) his situation by arranging for a substitute to work in his place. Failure to do so could lead to discharge for neglect of duty. In practice, a journeyman who knew he was going to be absent would notify the Chapel Chairman if he wanted to designate a particular qualified individual to act as his substitute. If the absent journeyman did not identify a particular replacement, the Chapel Chairman would select a qualified substitute from the slip board. At the Sun Papers this selection was done on the basis of a random draw, the work opportunity going to the individual who picked the bingo pill with the

highest number. At the News American substitutes were assigned in order of priority. The Foreman would put the designated substitute on the payroll as long as he was qualified for the job.

When a journeyman was absent for thirty days, he lost certain benefits, and his situation was offered to the highest priority substitute "TF" (to be covered until further notice). At the same time, the "dormant" situation was put up for claim for five days, and the substitute could be bumped by a situation holder with greater priority. This permitted the more senior employees to bump into more desirable jobs and shifts. The substitute was given the right to work in places of the journeyman who displaced him from the "dormant" situation. The substitute did not accumulate any rights, and when the absent situation holder returned, the substitute was removed from the situation and returned to the slip

board. However, during the tight labor market period, the Company kept journeymen who were hired as substitutes on the payroll by creating additional regular situations. As long as the demand for skilled journeymen exceeded the supply there were no "walkers," (journeymen who were sent home because there was no work for them).

In 1972 and 1973 the Employer's labor requirements started to decline as the Company moved toward an automated "cold-type" process. Management informed the Union that "office hires" would be reduced drastically, and very few extras were employed. During the negotiations for a new Contract that started in November, 1972, the parties were unable to resolve the problems associated with the changing technology, and the old Agreement was extended through 1973. The Contract that was finally signed on May 22, 1974, with an effective date of January 1, 1974,

provided lifetime job security for specifically listed employees who held situations as of January 1, 1974. In addition, another group of employees with priority date prior to January 1, 1974, but who were not situation holders as of that date, were given the opportunity to move to the protected list when situations on that list were vacated. The new Agreement dropped the reproduction provisions of the old Contract, and the Union gave up any claim it might have had to the backlogged reproduction carried on its records.

On January 1, 1974, there were 361 regular situation holders on the protected list and an additional 22 named substitutes on the supplemental list. Since that time all of the individuals on the supplemental list have moved to the protected list, and the total of employees with guaranteed lifetime situations has declined to 276. Throughout this period, and until December,

1976, the Company continued its practice of putting to work all of the designated substitutes. In late 1976, the Employer concluded that its manpower needs had declined to the point where it no longer needed the services of substitutes who were working in dormant situations, that is, in place of regular situation holders who had been absent more than thirty days. On December 2, 1976, the Company informed the Union of its new policy in a letter that included the following:

> "Effective Sunday, December 5, the A.S. Abell Company will cover any dormant situation up to a thirty day period only. No new situations will be created until further notice and substitutes presently covering dormant situations shall be returned to the sub board."

The Union protested the Company's action, and when the parties were unable to resolve the issues in dispute, the matter was appealed to arbitration.

At the hearing the parties authorized the Arbitrator to frame the issue on

the basis of their presentations. The initial issue was identified as follows:

> Did the Company violate its obligations under the Agreement when it refused to employ substitutes in situations where the regular situation holders had been absent over thirty days?

When the Company argued, in support of its position, that it was not obligated to employ substitutes to replace situation holders who were absent for any period of time, the parties agreed that the following additional issue was to be determined by the Arbitrator:

> Does the Company violate its obligations under the Agreement when it refuses to hire a substitute to replace a regular situation holder who is absent for any period of time?

Contract Provisions:

> Section 5
> This contract alone shall govern relations between the parties on all subjects concerning which any provision is made in this contract, and any dispute involving any such subjects shall be determined in accordance with the Code of Procedure.

Section 6
The General Laws of the International Typographical Union in effect at the time of signing this agreement (a copy of which is hereto attached), not in conflict with State or Federal laws, shall govern relations between the parties on conditions not specifically enumerated herein.

Section 12
The foreman shall hire all employees for composing room operations. Applications for work must be made to the foreman, who as the representative of the Office is the only person having the authority to employ journeymen in the composing room.
* * *
It is recognized that nothing in this Section shall interfere with the right of journeymen to employ competent substitutes without consultation or approval of the foreman.

Section 17
The Union will endeavor to furnish during the term of this Agreement as many qualified journeymen as are called for by an Office to perform the duties which are enumerated and specified in this Agreement.

Section 23
It is recognized by the parties to this agreement, Baltimore Typographical Union No. 12 and The A.S. Abell Company, publisher of The Sun and The Evening Sun and The Baltimore News American Division,

The Hearst Corporation, publisher of The News American, that a transitional period is being entered into with the utmost regard by both parties for the mutual preservation of the interests of the Union on behalf of its members who are presently employees of the Publishers, and the interests of the Publishers in maintaining economically sound enterprise able to compete successfully among themselves and with the constantly expanding competitive pressures of other media.

This agreement differs from previous collective bargaining agreements between the parties and qualifies future agreements relating to subjects herein dealt with in consideration of the following:

1(a). The Publishers agree that all siutation holders and all apprentices presently employed will be guaranteed life-time employment under the latest collective bargaining agreement so long as the newspapers are published by the Publisher who now employs them in substantially their present form and frequency, such guarantee subject only to termination of named employees on the list appended hereto by voluntary retirement, resignation, death and dismissals for just and sufficient cause under Section 18, sub-sections (2) and (3). In case strike, lockout or "Act of God", results in suspension of

publication temporarily of any Publisher's newspaper, this section will be inoperative only for the period of such suspension.

(b). The list of employees referred to in the above paragraph shall include in the protected category all situation holders (including those whose situations are dormant) who held situation as of January 1, 1974, and all apprentices.

(c). The protected list shall include also those replacement situation holders with priority as of January 1, 1974 who are on situations by reason of dormant situations referred to above.

(d). A supplemental list also shall be appended hereto which shall include the names of other journeymen with priority dates on or before January 1, 1974. Journeymen on this list shall be given the opportunity to move to the protected list when a situation on the protected list is vacated. The priority date of any Journeyman on the supplemental list who refuses a situation when offered shall be changed to the date of such refusal and his name shall be removed from the attached supplemental list.

2(a). The Publishers agree that in order to accomplish the purposes set forth in the Preamble, an early retirement plan for present situation holders shall be made available. The opportunity for

early retirement shall be extended on a voluntary basis to all employees of more than five (5) consecutive years of full-time service who have reached age sixty-two (62). The plan will be available to all qualified situation holders for the term of this agreement from date of execution and at the option of any publisher individually, may be extended.

* * * *

4. It is recognized by the parties that the job security provisions of this agreement and the retraining provisions of the basic agreement and this agreement may make the classifications of work as outlined in Section 43 inoperable. In this event, the Union and the Publishers agree that the foreman and the chairman in each composing room shall attempt to adjust any complaints of inequity. Any employee aggrieved by such determination shall have recourse to the appeal procedure of the Union and through the Union to the Code of Procedure of the Agreement.

Section 24(a).

It is understood that the job security, retraining, and early retirement benefit provisions of this agreement and the additional contributions for pension benefits provided below are in lieu of the reproduction provisions (Sections 23 and 24) of the previous agreement between the parties and that this agreement does not provide for

future reproduction; ...

General Laws of the International Typographical Union Effective January 1, 1974 .

Article II Section 10.
A foreman shall not designate any particular day, nor how many days a journeyman shall work in any one week: Provided, the journeyman must engage a substitute when absent. Any journeyman covering a situation is entitled to and may employ in his stead whenever so disposed any competent journeyman without consultation or approval of the foreman: Provided, Local unions may adopt laws requiring the employment of substitutes in the order of their priority standing; or for specified periods in severe unemployment emergencies, with the consent of the Executive Council, may establish provisions for equitable distribution of subbing among eligible substitutes.

Article V Section 6.
Any journeyman engaged to serve the International Typographical Union, a local union, or to perform work in the interests of the organized labor movement, shall employ while absent the available competent priority substitute. Journeymen performing aforesaid work, or any journeyman incapacitated by illness, shall not suffer loss of situation or priority standing while so employed or so incapacitated in the event a substitute is not available.

> Available priority substitute competent to perform the work must be employed on any new situation created because of the absence of a situation holder whose priority is protected under the provisions of this section or other sections of ITU laws or contracts. Local unions shall adopt laws specifying the time, which shall not be less than thirty nor more than ninety calendar days after which such new situation shall be filled. Should a substitute with greater priority become available, such substitute shall be placed on said siutation. Upon reporting for duty full priority rights shall be restored to the situation holder who was absent.

Issue No. 1

> Does the Company violate its obligations under the Agreement when it refuses to hire a substitute to replace a regular situation holder who is absent for any period of time?

Position of the Union:

The Union argues that under the terms of the Agreement, including those sections of the General Laws of the Union that are incorporated into the Agreement by reference, journeymen are obligated to employ substitutes and the Company is re-

quired to put them to work. The Company's right to refuse to hire substitutes was arbitrated in 1968, and Arbitrator Valtin ruled that the Agreement, ..."lodges the authority for hiring competent substitutes in the journeymen." The Valtin decision was reenforced by a subsequent Award written by Arbitrator Martin Rose. The Union argues that failure to provide a substitute is considered a neglect of duty, and maintains that the 1974 Agreement made no change in the journeymen's obligation to employ substitutes, or in the Company's obligation to place substitutes on the payroll. No relevant changes were made in the Agreement after the Valtin Award held that the journeymen had an absolute right to hire substitutes subject to the competency provisions of the Agreement, and the Company continued to honor the journeymen's right to employ substitutes until three weeks before the expiration of the current

Agreement, although there was a substantial excess of employees during most of 1975 and 1976. The Union argues that if the journeymen had the right to hire substitutes without job security, they surely have the same right with job security. The Union maintains that the Employer's right to lay off employees was restricted, not broadened, by the job security provisions of the 1974 Contract. The Union argues that the Company's obligation to permit substitutes hired by the journeymen to work was decided many years earlier through historical application of the substitute rule reenforced by the Valtin Opinion in 1968.

Position of the Company:

The Company argues that it has no contractual obligation to put substitutes to work, and asserts that there is no provision in the Agreement that requires the Company to hire any individual and/or

put that individual to work. The Company maintains that the new Section 23 contains the complete agreement of the parties with respect to the Company's employment obligations, and that it provides employment guarantees to named individuals, and to no others. The Company notes that Section 12 delineates the foreman's right to hire all composing room employees, and argues that the reference to the journeyman's so-called right to "employ competent substitutes" is an afterthought that merely differentiates between the foreman's contractual right to "hire" all regular situation holders and the regular situation holder's right under internal Union procedures to "hire" a substitute. The Company maintains that there is nothing in the Contract or in past history that obligates the Company to "hire" the substitutes "hired" by regular situation holders. The Company's sole obligation is to refrain from terminating the regular

situation holder when he is absent, so long as the situation is covered. The Company argues that by Contract and practice it has the right to reduce its extra manpower in accordance with the amount of productive composing room available, and notes in support of this argument, that under Section 17 of the Agreement the Union is obligated to furnish only as many qualified journeymen "as are called for by an office." Section 12 of the Contract gives the foreman the exclusive right to determine the size of the composing room work force, a provision that is consistent with Article II Section 11 of the Union's General Laws, which recognizes the Company's right to employ only "regular situation holders as are necessary to meet requirements and to reduce employment of extras to a minimum." The Employer notes that it is possible for journeymen to protect their situations without actual substitution, as provided

in the Union's laws in the event a substitute is not available, and during vacations when there is no right of substitution as provided in Section 61 of the Agreement. The Company argues that the Union's Laws provide for a journeyman's right to be absent if he engages a substitute, but do not give any rights to the substitutes. In summary, the Company argues that there is nothing in the Contract or in past history that imposes upon it the obligation to put to work extra employees, including substitutes, when there is no work available.

Discussion:

The Union argues that the Valtin decision in 1968 disposed of the issue when he rejected the Company's assertion that it had the right to refuse to put a substitute or extra to work. The following excerpts from this Opinion support the Union's contention:

> "...I think it is fair and accurate to characterize this as the Company's central theses, the Company contends that the power to establish the employer-employee relationship (which includes the power to refuse to establish or to re-establish it) is a power which is inherent, and resides exclusively, in any Management. ...I have given protracted consideration to these assertions and all that is before me in relation to them. My conclusion is that they cannot be accepted. ...The focal point is that the case arises under a collective-garbaining relationship in which the Company does not have the hiring latitude which it is asserting."
>
> * * *
>
> "...To requote the last paragraph of Section 12:
>
> 'It is recognized that nothing in this section shall interfere with the right of journeymen to employ competent substitutes without consultation or approval of the foreman.'
>
> I have already shown why I believe that 'competent' must be applied as being a matter of technical proficiency at the trade. The provision otherwise speaks for itself. It unequivocally lodges the authority for hiring competent substitutes in the journeymen."

Arbitrator Valtin rejected the distinction, urged by the Company, between "hire" and "employ," and found that the last paragraph

of Section 12 give the journeymen authority to hire competent substitutes. Without burdening this Opinion with further quotations from the Valtin Award, it is clear that he rejected explicitly the argument that the Agreement does not require the Employer to "hire" the substitutes "hired" by the regular situation holders. It is clear that he interpreted the right to "hire" a substitute as the right to have the substitute put to work by the Company. This interpretation is binding on the parties, and since the Section provides that substitutes may be hired "without consultation or approval of the foremen," it would appear that the plain language of the Agreement would authorize absent journeymen to hire substitutes whether or not the foremen believed they were required.

But a careful review of the Valtin Award establishes that he did not address

the basic issue raised in the current case. His Award concerned a dispute over the Company's right to refuse to employ a particular substitute, and there is no reference in his Opinion to the question of the Employer's rights if no substitute was required to perform the available work. He did not have to face that question, since in his case, the Company refused to employ the grievant although work was available in both the "extra" and "substitute" categories.

The Union's argument that historical practice supports its position is subject to the same weakness. Although the record indicates that the Company consistently put substitutes to work, there was no evidence that, prior to the 1974 Agreement, the Company had more extra employees than the number required by the available work. However the record does indicate that the Company continued to

employ substitutes in 1975, when, according to the testimony of the Employer's Vice President of Industrial Relations, it was over-manned. In December, 1976, the Company decided not to cover dormant situations after a thirty day period. But there is no evidence that the Company has ever refused to put substitutes to work when journeymen were absent for periods of less than thirty days, although for some time the Company has employed more people than it needs to perform the work required in the composing room. The record supports the conclusion that, by its consistent practice over a substantial period of labor surplus, the Company has established as the mutually accepted interpretation of the Agreement that it is required to put substitutes to work when they are hired by absent journeymen, even when their services may not be required by the available work.

Before it can be found that the

practice is binding on the parties, it must be established that the language of the Agreement does not require a contrary interpretation. A careful review of the Agreement establishes that the uniform practice followed by the parties is consistent with the relevant Contract provisions. As Arbitrator Valtin ruled, the last paragraph of Section 12 speaks for itself, and empowers the journeymen to hire competent substitutes without approval of the foreman. Article II Section 10 of the Union's Laws, which are recognized by the Agreement, states in part:

> "Any journeyman covering a situation is entitled to and may employ in his stead whenever so disposed any competent journeyman without consultation or approval of the foreman."

The Company argues that the substitution provisions of the Agreement and the Union Laws are for the sole purpose of protecting absent journeymen, and should not be interpreted as giving any employment

rights to the substitutes as long as the Company does not discipline journeymen who are absent. But the right of substitutes to replace absent journeymen serves to provide employment for the Union's Membership. Indeed, Article II Section 10 of the Union's laws recognizes the importance of the opportunity to substitute to its members when it states:

> "...Local unions may adopt laws requiring the employment of substitutes in the order of their priority standing; or for specified periods in severe unemployment emergencies, with the consent of the Executive Council, may establish provisions for equitable distribution of subbing among eligible substitutes."

The right to hire substitutes, recognized by Section 12 of the Agreement, is clearly not just for the protection of the journeymen's jobs. It serves to increase employment opportunities for the Union's unemployed members. The journeymen did not give up the right to hire substitutes

without the approval of the foreman when they were given job security by a different and unrelated contract provision. The fact that under some circumstances journeymen are able to protect their situations without actual substitution is irrelevant, since the right to hire substitutes is not constrained by the need to protect situations.

The Contract provisions cited by the Company do not support the position that it is not required to hire substitutes if their work is not needed. Section 17 obligates the Union to try to furnish as many qualified journeymen as are called for by an Office. This is a Union requirement, and does not amend, modify or weaken the journeymen's right, as recognized in Section 12, to employ competent substitutes. The fact that this right is frequently exercised through the Local Union, does not alter the fact that

it is the journeymen's right as provided in the Agreement. Article II Section 11 of the Union's Laws provides that:

> "A foreman...must have such number of regular situations as are necessary to meet requirements and to reduce employment of extras to a minimum."

But this Article simply requires the foreman to establish the maximum number of regular situations. The Company has not suggested that the regular situations held by absent journeymen are to be eliminated, and Section 11 of the Union's Laws does not limit the employment of substitutes for absent situation holders.

The Company's principle contractual argument is that Section 23 contains the parties' complete agreement with respect to the Company's employment obligations, and that under its terms, the Company is not obligated to provide employment for anyone not on the protected lists established by the job security section. It

is argued that the 1974 Agreement removed any obligations toward substitutes. Under cross examination, Mr. Banach, Vice President for Industrial Relations at the Baltimore Sunpapers, testified as follows:

> Q. Well, that's your position here, is it not, that any obligations you had towards substitutes ceased as a result of the '74 negotiations?
>
> A. That's correct.

The Company argues, in essence, that since it agreed to provide job security for a specifically identified group of employees, it has no further obligation to employ substitutes who are not on the list. But no connection has been shown between the language of Section 23, and the various provisions of the Agreement, and of the Union's Laws, that establishes the journeymen's right to hire substitutes. Section 12 of the Agreement was unchanged, and continues to recognize the journeymen's right to employ substitutes. Article II

Section 10 of the Union's Laws continues to provide that a journeyman "must engage a substitute when absent," and there is no evidence that his failure to do so is no longer considered neglect of duty and a proper cause for discipline. Section 10 continues to provide that a journeyman covering a situation is entitled to employ in his stead any competent journeyman without consultation or approval of the foreman. There is nothing in Section 23 that conflicts with either of these provisions. The granting of job security to regular situation holders does not eliminate their contractual right to hire substitutes, and the parties did not change any of the Contract's provisions that affect the journeymen's right to employ substitutes. In paragraph 4 of Section 23, the parties noted that the new job security and retraining provisions might make certain parts of Section 43 inoperable, and

they established a procedure to adjust problems that might arise. In contrast, there is no suggestion that the new job security provisions might affect the right to hire substitutes, and the Company's assertion that Section 23 eliminated its obligation to put substitutes to work is without foundation in the Agreement.

Section 61 of the Agreement provides additional support for the position that the journeymen's right to hire substitutes was unaffected by the new job security provisions. It states that:

> "Employees on paid vacations have not right of substitution, the Office having the sole right to determine how many, if any, replacements are to be hired."

If the Employer had the general right to decide whether or not to hire substitutes, it would not have been necessary to provide this special right when employees are absent on paid vacation. Section 61 implies that when employees are not absent on paid va-

cations, they have the right of substitution and the Office does not have the sole right to determine how many, if any, replacements are to be hired. The presence of Section 61 in the Agreement, together with the last paragraph of Section 12, is stark evidence that the parties did not repeal the right of substitution when they signed the 1974 Agreement.

The Company's position argues that it is not obligated to provide any employment guarantee to individuals not included in the protected lists drawn up in accordance with Section 23. But the right to employ substitutes is not an employment guarantee for particular individuals for any period of time. When a situation holder is absent for less than thirty days, different substitutes might fill in for him during the period of his absence. When the absence is for more than thirty days, the senior substitute is given the opportu-

nity to cover the position, but when the situation holder returns to work, the substitute may be returned to the slip board. The job security provisions are separate and distinct from the right of substitution, and to the extent that the right of substitution adds to the employment opportunities for journeymen, that result is not inconsistent with any provision of the Agreement, or with what appears to have been the intent of the parties when the right to hire substitutes was established.

At this point the arguments presented by the parties concerning the right to hire a substitute when a situation holder has been absent for more than thirty days have not been considered. With respect to Issue No. 1, it is found that the language of the Agreement, the applicable Laws of the Union, and the practice followed by the Company since 1974 support the finding that the Company violates its obligations under

the Agreement when it refuses to hire a substitute to replace a situation holder who is absent for a period of not more than thirty days.

Issue No. 2

> Did the Company violate its obligations under the Agreement when it refused to employ substitutes in situations where the regular situation holder had been absent over thirty days?

Position of the Union:

The Union argues that the journeymen's right to hire substitutes is not changed after a thirty day absence. The Union notes that although shift and time of the dormant situation are open for bids, there is no increase in the number of regular situations after thirty days; a substitute continues to replace the absent situation holder, and the substitute is removed from the situation and may be returned to the sub-board when the absent situation holder returns to work. The Union argues that

this practice has been confirmed as the mutual interpretation of the 1974 Agreement by the Company's continued employment of substitutes for journeymen absent more than thirty days, for almost three years after the new Agreement was signed.

Position of the Company:

The Company argues that there is no contractual basis for the Union's claim that substitutes must be employed to work in situations that have been vacant for more than thirty days. The Company alleges that historically no substitutes have worked in situations as substitutes for more than thirty days, since the Union's Laws provide that when a substitute has worked for thirty days in a situation he must be given his own situation on the thirty-first day. In practice, the highest priority substitute has been given the new temporary situation "TF," (until further notice) on the thirty-first day and has

occupied that situation indefinitely. The Company argues that after the thirty-first day the substitute becomes a new or temporary situation holder and is no longer a substitute. The Company maintains that Section 23 of the Contract prohibited the practice of creating new situations, and eliminated the Company's obligation to employ substitutes. The Company maintains that the Union has not challenged the Employer's progressive reduction in employment opportunities for extras, and should not be permitted to reverse this long-existing trend through arbitration.

Discussion:

The Company's argument on this issue rests primarily on the language of Article V, Section 6 of the Union's General Laws, which states in part:

> "Available priority substitute competent to perform the work must be employed on any new situation created because of the absence of

> a situation holder whose priority is protected under the provisions of this section or other sections of ITU laws or contracts. Local unions shall adopt laws specifying the time, which shall be not less than thirty nor more than ninety calendar days, after which such new situation shall be filled. Should a substitute with greater priority become available, such substitute shall be placed on said situation. Upon reporting for duty full priority rights shall be restored to the situation who was absent."

In fact, the Local Union in this case has not adopted a speacific law as required by Section 6, but the parties agree that after a situation holder was absent for thirty days, his situation was filled by the available priority substitute and was put up for claim. In the discussion below I have referred to the time specification of Section 6 as if it were thirty days, which is the time period utilized by this Local Union.

A careful reading of Section 6 does not reveal any language that can reasonably

be interpreted as giving a substitute "his own" situation after thirty days. Whether the vacant situation is called "new," as argued by the Company, or "temporary," which has been the practice of the Local Union, Section 6 does not turn the substitute into a situation holder after thirty days. It simply and clearly states a rule for determining which substitute shall be employed as a replacement after that time period. The absent journeyman is referred to as a "situation holder," and the replacement is consistently identified as a "substitute." Thus Section 6 states:

> "Available priority substitute ... must be employed on any new situation created because of the absence of a situation holder ..."
> * * *
> "Should a substitute with greater priority become available, such substitute shall be placed on said situation. Upon reporting for duty full priority rights shall be restored to the situation holder who was absent." (emphasis added)

The Union's rules change the procedure for

selecting substitutes after a situation has been vacant for thirty days. Article II Section 10 permits an absent journeyman to employ in his stead "any competent journeyman," although "Local unions may adopt laws requiring the employment of substitutes in the order of priority standing..." After thirty days, as a minimum, and ninety days as a maximum, the "available priority substitute competent to perform the work must be employed." The substitutes are not given their own situation after thirty days and they do not have any job security other than the right to substitute. They may be replaced if a substitute with greater priority becomes available, and they must relinquish the situation when the absent situation holder reports for duty. The Company argues that as a matter of practice substitutes who have replaced situation holders for more than thirty days have

occupied that situation indefinitely. But to the extent that the Company continued to employ journeymen after the situation holders for whom they have worked as substitutes returned to work, it did so in response to its manpower needs, and not because there was any contractual restriction on the Company's right to return substitutes to the sub board when the journeymen they had been replacing returned to work. Some of the substitutes have worked as replacements for extended periods of time, but their continued employment is based on the absent situation holders' right to employ competent journeymen in their stead - a right that is not limited in the Union's Laws, or in Section 12 of the Agreement, to an absence of thirty days or less.

Contrary to the Company's Position, absences of more than thirty days do not create additional situations, or new situation holders. The substitutes who are

selected in accordance with the procedures set forth in the Union's Laws for absences of more than thirty days fill the vacancies made available because of the absence of regular situation holders. They are designated as, and they are in fact, substitutes, and under the terms of the Agreement and the applicable Union Laws, the Company must employ them when they are hired by the absent situation holders.

As indicated above, there is nothing in Section 23 that eliminates the Company's obligation to employ substitutes as required by other sections of the Agreement and the Union's Laws. This is as true for absences of more than thirty days as it is for shorter absences. The Company notes that the Union has not challenged the Company's progressive reduction in employment opportunities for extras, but there is nothing in the record that would indi-

cate that the Union has ever waived the journeymen's right to employ substitutes. The Company argues that the Union should not be permitted to reverse the long-run reduction in employment opportunities for extras through arbitration, rather than collective bargaining. But the grievance under review alleges that the Company violated the language of the Agreement as confirmed by consistent practice over a substantial period of time, and arbitration is the appropriate mechanism for the adjudication of that claim.

In summary, a thorough review of the record requires a finding that the journeymen's right to employ substitutes for absences of more than thirty days is supported by the Agreement, the Union's Laws, and consistent practice over a period of time that included a period of surplus manpower.

The Company alleges that the relief

requested by the Union, "payment for the days on which the subs were not permitted to work," has no basis in the Contract since there are no substitutes who have any employment rights under the terms of the Agreement. The Company argues that its employment obligations are limited to those specifically named individuals with priority dates prior to January 1, 1974, all of whom have since become regular situation holders. The Company asserts that the substitutes who were allegedly "deprived of some employment" as a result of the Company's action, did not have any contractual right to employment, and have no contractual right to relief. But job security, as provided by Section 23 of the Agreement, is separate and distinct from the situation holders' right to employ substitutes for periods of absence. The individuals who were not permitted to work are not entitled

to any of the benefits of Section 23, but they were entitled to be employed as substitutes under the terms of Section 12 of the Agreement, and the provisions of the applicable Union rules. Since they were denied this contractual right, the Company is obligated to make them whole for the earnings lost because of the Employer's violation of the Agreement.

Decision and Award:

The Company violates its obligations under the Agreement when it refuses to hire a substitute to replace a regular situation holder who is absent for any period of time.

The Company violated its obligations under the Agreement when it refused to employ substitutes in situations where the regular situation holders had been absent for over thirty days.

The Company is instructed to make

whole those journeymen who were not permitted to work as a result of the Company's letter of December 2, 1976, by paying them the earnings they would have received if they had been employed as substitutes for the regular situation holders who had been absent for more than thirty days. Any unemployment compensation or earnings from other employment shall be subtracted from the Company's liability.

The Company is instructed to employ competent substitutes in accordance with the procedures set forth in the Agreement, and in the applicable Union Laws, as replacements for regular situation holders who are absent for any period of time.

/signature/
Myron L. Joseph
Chairman, Board of Arbitration

/No signature/
John Banach
Company Board Member

/No signature/
Paul C. Bowen
Company Board Member

/Signature/ 9/14/77
Theodore Kees
Union Board Member

/Signature/ 9/20/77
Jack Poist
Union Board Member

CIRCUIT COURT FOR BALTIMORE CITY

SAUNDRA E. BANKS, Clerk
COURT HOUSE
BALTIMORE, MARYLAND 21202

WRIT OF SUMMONS

JUNE RETURN DAY

Case No. 84 135 042 /L20441

STATE OF MARYLAND, BALTIMORE CITY TO WIT:

TO: A. S. ABELL PUBLISHING COMPANY

501 NORTH CALVERT ST.

21202

You are hereby summoned to the Circuit Court for Baltimore City to file a written answer or other defense on or before JUNE 19, 1984 to the action of KONDIAN R. RAJARAM

WITNESS the Honorable Chief Judge of the Eighth Judicial Circuit of Maryland.

Issued: MAY 14, 1984

/Signature/
Saundra E. Banks

EDWARD MAKOWSKI Attorney
LAW

Arundel Federal Savings & Loan Association v. Chester C. Lawrence, III, et ux, 499 A. 2d 1298

AURNDEL FEDERAL SAVINGS & LOAN ASSOCIATION

V.

Chester C. LAWRENCE, III, et ux.

No. 202, Sept. Term, 1985.

Court of Special Appeals of Maryland.

Nov. 12, 1985.

In dispute over proceeds from mortgage foreclosure sale, the Circuit Court for Anne Arundel County, Bruce C. Williams, J., found that prospective purchasers had vendee's lien superior to claims of construction lender, and lender appealed. The Court of Special Appeals, Wilner, J., held that prospective purchaser's lien was subordinate to that of lender by virtue of "consent" clause in purchase agreement.

Reversed in part and remanded.

1. Liens -- 12

Absent specific law to the contrary, lien priorities established by law may be altered by agreement.

2. Mortgages -- 159

Purchaser can, if he chooses, subordinate his lien to that of construction lender which otherwise would be inferior to his own, but such agreement will not lightly be implied.

3. Liens -- 12

Answer to whether language in agreement will suffice to effect lien subordination must ordinarily depend on intent of parties ascertained from wording of agreement interpreted in light of all attending circumstances.

4. Contracts -- 143.5

In construing contract, each clause must be given effect if reasonably possible.

5. Mortgages -- 159

Prospective purchasers' lien was

subordinate to that of construction lender where only purpose of "consent" clause in purchase agreement was to insure that lender's lien would be paramount.

Lance I. Yateman (Carl A. Muly and Mezger, Muly & Yateman, on brief), Glen Burnie, for appellant.

1. Actual dealings were with Elwood Black, who was apparently the alter ego of the corporation.

Hans Froelicher, IV (Robert W. Warfield, on brief), Severna Park, for appellees.

Argued before MOYLAN, WILNER and GARRITY, JJ.

WILNER, Judge.

The dispute now before us is over the proceeds from a mortgage foreclosure sale. The disputants are Arundel Federal Savings and Loan Association, appellant, which held the mortgage, and Chester and Elaine Lawrence, appellees, who were

contract purchasers of the mortgaged property.

On July 12, 1983, appellees entered into a contract to purchase from E. Black & Sons, Inc. (Black)1 a certain lot in the Chartwell on the Severn community, the lot "to be improved by the erection and completion of a single family dwelling to be built in substantial conformance with the plans and specifications attached hereto...." The price was $151,150, of which $16,000 was said "to have been paid prior to the signing hereof." The balance was to be paid at time of settlement, which was to be on or before five months from the issuance of the building permit. The parties agree that the $16,000 deposit was indeed paid to Black.

Black did not own the lot in question when the contract was signed, but it was understood that he would acquire it, which he proceeded to do. It was also

understood by both Black and the Lawrences that Black would need a construction loan in order to build the house. In that light, the contract provided that "[t]he buyers understand and consent to the seller placing a construction mortgage on the property for the term of this contract."

Both Black and the Lawrences applied to appellant for their respective financing--Black for a construction loan, the Lawrences for their "permanent" mortgage loan.

> For convenience, we shall occasionally use the masculine pronoun in referring to Black.

A copy of the contract of sale showing both the $16,000 deposit and the Lawrences' consent to Black's obtaining a construction mortgatge was given to appellant in connection with each application. Appellant made the loan to Black in September, 1983. Black thereupon purchased

the unimproved lot from its then-owner, obtained a building permit, and began construction.

In December, Black fell behind in its construction schedule; the Lawrences, attempting to salvage the deal, agreed to a number of design modifications and extended the five-month period allowed for construction. It all was in vain, however, for in June, 1984, appellant instituted foreclosure proceedings on its mortgage which, together with accrued interest, late charges, and expenses, then stood at $117,963. The property was sold in September for $105,000.

The Lawrences filed, in the foreclosure proceeding pending in the Circuit Court for Anne Arundel County, an application for payment of their "vendee's lien" of $16,000 and $7,456 in expenses advanced toward the construction.

Appellant contested both claims, relying primarily on the "consent" in the contract as a defense to the asserted vendee's lien. Following an evidentiary hearing, the court, on November 29, 1985, sub silentio rejected the claim for $7,456 but found that the Lawrencaes had a vendee's lien in the amount of $16,000 and that that lien was superior to the claims of appellant. Having announced those findings, the court referred the matter to an auditor to "state his account in accordance with the terms of this Order."

The auditor's account has yet to be stated. Appellant responded to the court's November 29 order with a motion under Md. Rules 2-533 and 2-534 for "new trial and/or to alter or amend judgment." That motion was denied on December 13, 1984, whereupon appellant, on January 8, 1985, filed an order for appeal "from the final

judgment establishing a vendee's lien in favor of [the Lawrences] entered in this action on Novembaer 29, 1984." In this appeal, appellant raises five issues, of which we need address only two. As a preliminary matter, however, we think a word ought to be said about

(1) Appealability of the November 29 Order

In the early case of Snowden v. Dorsey, 6 H. & J. 114 (1823), the Court of Appeals held squarely that an appeal would not lie from an order, such as this one, that, though purporting to adjudicate a dispute between the parties, effectively did no more than to direct the court auditor to state an account in a certain way. Having in mind the fact that the issue purportedly decided could be relitigated upon the filing of exceptions to the auditor's account, the Court observed, at 116:

"It is easy to perceive, that

> appeals from orders of this description might be productive of great inconvenience and vexatious delays, which should not be incurred without necessity; and there can be no such necessity where nothing is done conclusive upon the Chancellor; but the order remains open, subject to his final disposition, and may be rescinded on motion."

That rule was abrogated by the General Assembly in 1845. Obviously not sharing the Court's concern over the potential for inconvenience and delay, the Legislature, by 1845 Md.Laws, ch. 367, expressly permitted an appeal to be taken from any equity decree or order "determining a question of right between the parties and directing an account to be stated, on the principle of each [sic, such] determination...." That statutory right has been part of the law for the past 140 years; it presently appears as Md.Code Ann. Courts art., § 12-303(3)(vi).

We mention this long-standing

change in the law only because there appears language in a number of Opinions issued after 1845 that, read literally, would seem to follow the Snowden rule or suggest its current viability. See, for example, Johnson v. Hoover, 75 Md. 486, 490, 23 A. 903 (1892); Hohensee v. Minear, 253 Md. 5, 6, 251 A.2d 588 (1969); Anthony Plumbing of Md. v. Atty. Gen., 298 Md. 11, 16-17, 467 A.2d 504 (1983). Compare, however, Conner v. Groh, 90 Md. 674, 680, 45 A. 1024 (1900), where the statute was recognized and applied, and Wilhelm v. Caylor, 32 Md. 151, 161 (1870), where it was recognized but found inapplicable. While some of the post-1845 cases involved the allowance of attorneys' fees rather than issues of priority among competing claimants, and possibly can be distinguished on that or some other basis, we thought it well nevertheless to make clear that, under the

statute, such an order is immediately appealable.

(2) Who Has Priority?

Appellant acknowledges that there is such a thing as a vendee's lien. In Gribble v. Stearman & Kaplan, Inc., 249 Md. 289, 239 A.2d 573 (1968), the Court discussed the nature of that lien. At 296, 239 A.2d 573, it said:

> "This Court has recognized that a vendee is entitled, in equity, to a lien on land which is the subject of the sales contract, to the extent of the payments made on the purchase price. The lien arises only in the event the contract, through the fault of the vendor, is not consummated.... Although no Maryland case has specifically so held, it is generally accepted that the vendee's lien may not be defeated by a subsequent grantee of the vendor who takes with knowledge of the existing contract." (Citations omitted.)

See also Stahl v. Roulhac, 50 Md.App. 382, 438 A.2d 1366 (1982), where, at 385, 438 A.2d 1366, we construed Gribble as meaning that the vendee's lien "is enforceable not

only against the seller, but also against any person who subsequently acquires an interest in the property with knowledge of the existing contract...."

Under this view, it would seem clear that appellant's lien would be subordinate to that of appellees. It made its loan and took its mortgage with full knowledge of the contract of sale and the deposit paid thereunder.

To defeat that conclusion, appellant urges that (1) because appellees entered into their contract with Black knowing that Black did not then own the lot in question and knowing further that Black intended to place a construction loan mortgage on the lot, they were not "bona fide purchasers" and thus, on general equitable principles, their lien should not prevail over that of appellant, and (2) as a matter of contract law, by virtue of the

"consent" clause in the contract, they expressly subordinated their vendee's lien to that of the construction loan mortgage.

Appellant's "equitable" argument rests upon what we regard as a strained, and inappropriate, extension of Westpark, Inc. v. Seaton Land Co., 225 Md. 433, 171 A.2d 736(1961). Westpark involved a situation in which a landowner gave a right of first refusal to one person, good for five years, and then, within the five-year period, contracted to sell the same land, together with other land, to another. Although the right of first refusal was not recorded and the buyer was unaware of it when he entered into the contract, he became aware of the right before he consummated the contract. The dispute, essentially, was between the holder of the right of first refusal (Westpark) and the contract purchaser (Seaton). The Court of Appeals

held for Westpark, stating, at 450, 171 A.2d 736:

> "The general rule is that a purchaser of real estate takes subject to outstanding equitable interests in the property, which are enforceable against the vendor, where the purchaser is not entitled to protection as a bona fide purchaser...; and one who purchases the equitable title to real estate is not protected as a bona fide purchaser where he receives notice of a prior equity before he acquires the legal title ... or where he receives notice before he has paid all or substantially all of the purchase price."

Appellant seeks to place appellees in the position of Seaton, stressing their knowledge, at the time of contracting, that Black did not yet own the lot which was the subject of the contract and that he intended to place a construction loan mortgage on the lot. We find neither circumstance to be of significance under the facts of this case.

A vendee's prior knowledge that his vendor has no title to (and thus no power to convey) the subject matter of the

contract could, we imagine, be important where the failure to consummate the contract is due to that lack of title. In that circumstance, the vendee's lien might have to give way to the rights of other, more innocent claimants. But that is not the case here. It was contemplated that Black would acquire the lot and he in fact did so. The default on the contract arose from his inability to complete the construction, not his inability to acquire or convey the lot.

Appellant's attempt to equate appellee's knowledge of a "contemplated construction loan" to knowledge of an "outstanding equitable interest" is equally without merit. Appellant had no "equitable interest" in the property when appellees and Black entered into their contract on July 12, 1983. Although it was certainly anticipated at that time that a construction loan would be needed and obtained, there

was no evidence to indicate, or even suggest, that appellant would make the loan. Indeed, Black did not even apply to appellant for the loan until after the contract was signed. It was not until August 8--nearly a month after the contract was signed--that appellant issued a commitment for the loan; the actual loan was not made until September 21. No case of which we are aware has gone so far as to equate a supposition that a lender might make a loan if an application were filed, with an "outstanding equitable interest," and we shall not be the first to establish any such principle.

We turn then to appellant's alternative theory, that, by expressly consenting in advance to the placement of a construction loan mortgate on the property, appellees have effectively subordinated their vendee's lien to that mortgage. In this there is more substance.

[1-3] As a general rule--i.e., absent some specific law to the contrary--priorities established by law may be altered by agreement; thus, a vendee can, if he chooses, subordinate his lien to that of a construction lender which otherwise would be inferior to his own. Such an agreement will not lightly be implied, however. As noted in Jones v. John S. Stubbs & Assoc., 243 Md. 480, 483, 221 A.2d 361 (1966), the answer to whether particular language in an agreement will suffice to effect a subordination "must ordinarily depend on the intent of the parties ascertained from the wording of the agreement interpreted in the light of all the attending circumstances." In effect, this is merely an application of the "objective" law of contracts to what is essentially a matter of contractual interpretation.

[4] The language in question--"[t]he buyers understand and consent to the seller placing a construction mortgage on the property for the term of this contract"--is certainly not of a type normally used to express an intent to subordinate one lien to another. Indeed, it is not couched at all in terms of a vendee's lien and never uses the word "subordinate." Yet, it must have some purpose. In construing a contract, each clause must be given effect if reasonably possible. Sagner v. Glenangus Farms, Inc., 234 Md. 156, 167, 198 A.2d 277 (1964). As we said in Insel v. Solomon, 63 Md.App. 384, 395-96, 492 A.2d 963 (1985),

> "Courts are not free simply to ignore provisions in a contract because they may be poorly drafted. Rather, 'under the objective law of contracts, a court, in construing an agreement, must first determine from the language of the agreement itself, what a reasonable person in the position of the parties would have meant at the

> time it was effectuated.'...If the language is clear, it controls; if it is ambiguous, the court may consider extrinsic factors in ascertaining what the parties intended." (Citation omitted.)

[5] The contract was drafted by the builder, Black. Mr. Black testified that he inserted the "consent" clause at the insistence of appellant, adding that he understood that "a lender would not make a loan unless a contract purchaser consented to that mortgage loan." A loan officer from appellant confirmed that understanding, stating that, if such language is not in the contract of sale, he would have the buyer sign a separate "consent to mortgage" form.

Neither appellant nor Black needed appellees' consent in order to make the loan or encumber the property; at the time of the loan, the property would (and did) belong solely to Black, who was fully empowered to encumber it. Why, then, would

appellant insist on the language, but to ensure that its lien would be a paramount one? What other purpose could it reasonably have? More important, what would a reasonable person in the position of the parties think it meant at the time the contract was signed? Under the circumstances, we can see only one answer: it was intended to subordinate appellees' equitable rights under the contract, which would include their vendee's lien, to that of the construction loan mortgage.

Accordingly, we believe that the Circuit Court erred in its conclusion that appellees' lien was superior to the claims of appellant, and shall therefore reverse that part of its November 29, 1984 order.

ORDER REVERSED IN PART; CASE REMANDED TO CIRCUIT COURT FOR ANNE ARUNDEL COUNTY FOR FURTHER PROCEEDINGS; APPELLEES TO PAY THE COSTS.